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No. 83-

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In The
Supreme Court of the United States
October Term, 1983

VOLKSWAGEN OF AMERICA, INC.,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (JOAN NOSSE, et al Individually and on Behalf of All Others Similarly Situated, Real Parties in Interest)

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does Section 1781(d) of the California Civil Code violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States when applied to require notice of the pendency of a class action by publication only, even to members of a class of plaintiffs whose names and addresses can be ascertained with reasonable effort?

Does Section 1781(d) of the California Civil Code violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States when applied to require a defendant opposing a class to pay substantial costs of notice to the class prior to any determination of liability and without hope of reimbursement if defendant prevails or if class certification is limited or rescinded?

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Pursuant to Rules 15.1 and 28.1, appellant states that real parties in interest (hereinafter "appellees") not named in the caption of this action in this Court are plaintiffs Jerry Kane, Gwen Wong, Yao Tao Fang and Katherine T. Fang, and Cliff Hoffmann, appellant's parent corporation is Volkswagenwerk Aktiengesellschaft, a German corporation, and appellant has no corporate subsidiaries or affiliates other than wholly owned subsidiaries or corporations formed to promote a joint venture between appellant and another separate and independent corporation.

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No. 83-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

VOLKSWAGEN OF AMERICA, INC.,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO
(JOAN NOSSE, et al Individually and on Behalf of All
Others Similarly Situated, Real Parties in Interest)

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

Volkswagen of America, Inc., the appellant, hereby appeals from a final order of the Supreme Court of California, dated February 1, 1984. The order appealed from denied appellant a hearing on its challenge to section 1781(d) of the California Civil Code as repugnant to the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The order thus upheld that statute as constitutionally valid when applied to require that notice of the pendency of a class action be given by publication only, even to thousands of class members whose names and addresses are available with reasonable effort, and to impose substantial notice costs on a defendant opposed to the class, prior

to any determination of its liability to the class and without any prospect that such costs may later be recovered.

OPINIONS BELOW

The order appealed from (appended hereto at page 1a, *infra*) is reported in the California Official Reports, 1984, Number 7, at page 28. The order of the Superior Court of the State of California, County of San Francisco, dated September 6, 1983, prescribing the challenged notice procedure and allocation of costs (3a-4a), and the order of the Court of Appeal of the State of California, First Appellate District, dated November 23, 1983, denying intermediate appellate review of the trial court's order (2a), are unreported.

JURISDICTION

This appeal seeks review of trial and appellate court orders which, in accordance with §1781(d) of the California Civil Code, (1) require notice by publication only in a class action, even where tens of thousands of members of the class may be identified from computerized lists maintained by appellant, and (2) impose substantial notice costs on a defendant opposing the class, prior to any determination on the merits, and without any showing that the named plaintiffs can reimburse such costs if they do not prevail on the merits or if class certification is later rescinded.

The order of the Supreme Court of the State of California denying appellant a hearing on its constitutional challenges was filed on February 1, 1984 (1a). Notice of Appeal submitted to the Court of Appeal of the State of California, was duly filed on February 10, 1984 (15a-16a). Notice of Appeal tendered to the California Supreme Court on March 28, 1984

(11a-12a), has been acknowledged as "Received" as of April 10, 1984 (13a).[1]

This appeal is being docketed in this Court within ninety days from the denial of hearing below. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481-482 (1975); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-172 (1974); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 557-558 (1963); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). In the alternative, jurisdiction is invoked under the provisions of 28 U.S.C. §2103.

CONSTITUTIONAL PROVISIONS AND STATUTE

Fifth Amendment, United States Constitution

> "... nor shall any person ... be deprived of life, liberty, or property without due process of law...."

Fourteenth Amendment, United States Constitution

> "... [n]or shall any State deprive any person of life, liberty or property without due process of law...."

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1. Notice of Appeal was first submitted to the California Supreme Court on or about February 10, 1984. However, such notice was rejected at that time, apparently due to the fact that the record remains lodged below in the Court of Appeal (11a).

Section 1781(d), California Civil Code

"If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication . . ."

STATEMENT OF THE CASE

This is a class action brought under California law on behalf of certain current and former owners of 1974-1979 model year automobiles distributed by appellant. Appellees, plaintiffs below, allege that valve stem seals (internal engine parts) in such vehicles were defective, leading to a spectrum of possible mechanical problems among individual class vehicles (6a).

As certified, this action seeks recovery for the cost to individual class members of any "excessive" oil consumption and related repair caused by the allegedly defective parts, and other incidental and consequential damages, which "will vary with the facts of each case" from "nominal" to the cost of a "replaced engine." (7a) The size of the class is estimated at 200,000 persons. (6a)

The individual identities of a substantial proportion of the certified class cannot be established. However, the names and addresses of as many as 50,000 or more class members are ascertainable from appellant's computerized "Vehicle Data File." (83a; 81a-84a, *passim*)

There has been no determination on the merits in this case. In the words of the class notification ordered by the trial court, "THE COURT'S ORDER THAT THIS ACTION MAY PROCEED AS A CLASS ACTION IS NOT A DETERMINATION OF THE MERITS OF ANY OF THE CLAIMS ASSERTED BY THE PLAINTIFFS. . . . This notice is not to be understood as an expression of any opinion by the court as to the merits of any claims or defenses . . . in this litigation." (8a, par. 5 (emphasis in original.)) In addition, the record contains no showing whatever that appellees can defray or reimburse appellant for the costs of notice.[2]

Nevertheless, the trial court required notice by publication only, in conformity to the criteria of Section 1781(d), California Civil Code. The trial court further ordered appellant to "advance" 75% of the cost of the notice ordered (3a).[3] No security for such costs has been required, despite appellant's arguments that such security was necessary in order to avoid a permanent deprivation of its constitutionally protected property. Appellant's share of such costs is at least $23,000. (19a)

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2. Representations of counsel and supporting affidavits of appellees categorically asserting appellees' inability or unwillingness to defray any substantial notice costs were stricken by the trial judge when deposition testimony on these matters was refused by appellees (31a-33a, *passim*).

3. The trial court's order also purports to extend to appellant "the right, *at its sole expense,* to cause additional notice to be given by publication or direct mail." (4a) (Emphasis added).

Raising The Federal Questions

The constitutional questions presented on this appeal have been explicitly raised and thoroughly argued at every stage of the relevant proceedings below.[4]

At the outset of proceedings before the trial court on class notice, appellees urged that publication notice, or no notice at all, be given, and that all costs be imposed upon appellant, in explicit reliance on California authority construing and applying Section 1781(d) of the California Civil Code (86a-93a). Appellant opposed such notification procedures and cost allocation on the constitutional grounds urged on this appeal (68a-80a). Following entry of the trial court's September 6, 1983 class notification order, appellant sought a writ of mandate from the Court of Appeal to review the unconstitutional aspects of the lower court order. The questions now before this Court were argued once more by both sides (29a-57a). The Court of Appeal denied appellant's petition on November 23, 1983, and appellant petitioned for review in the Supreme Court of California, urging that "to the extent section 1781(d) of the California Civil Code authorizes the order below, the section contravenes the due process clauses of the Federal and California Constitutions". (17a-18a; 26a) The February 1, 1984 denial of hearing by the California Supreme Court from which this appeal is taken thus explicitly considered and rejected the precise federal constitutional positions urged on this appeal.

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4. Portions of both parties' submissions below addressed to the issues raised on this appeal are reprinted at pp. 17a-99a *infra*.

THE QUESTIONS ARE SUBSTANTIAL

The Need for Guidance from This Court

In Eisen v. Carlisle & Jacquelin, supra (hereinafter *"Eisen IV"*), this Court definitively addressed the issues presented on this appeal, with respect to federal courts applying Rule 23(c), Fed. R. Civ. P. Despite the obvious constitutional implications of that decision, this Court had no occasion to rule on the relevant due process issues directly. These questions, accordingly, continue to be unresolved and the topic of extensive discussion and debate.[5]

Courts and commentators have long recognized that class action notification and the allocation of

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5. Prior to this Court's decision in *Eisen IV, supra*, this discussion was well under way, both in the federal courts, *e.g., Greenfield v. Villages Industries Inc.*, 483 F.2d 824, 831-832 (3rd Cir. 1973); *Eisen v. Carlisle & Jacquelin ["Eisen III"]*, 479 F.2d 1005 (2d Cir. 1973), vacated and remanded, *Eisen IV, supra; Eisen v. Carlisle & Jacquelin ["Eisen II"]*, 391 F.2d 555 (2d Cir. 1968); *Contract Buyer's League v. F&F Investment*, 48 F.R.D. 7 (N.D. Ill. 1969); *Berland v. Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D.Pa. 1968); *Eisen v. Carlisle & Jacquelin ["Eisen I"]*, 41 F.R.D. 147 (S.D.N.Y. 1966), and among commentators. *E.g.*, Fisch, *Notice, Costs and the Effect of Judgment in Missouri's New Common-Question Class Action*, 30 Mo. L. Rev. 173 (1973); Homburger, *State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609 (1971); Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 Tex. L. Rev. 1 (1970); Recent Development, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Actions Rejected*, 73 Col. L. Rev. 1641 (1973); Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 Md. L. Rev. 139 (1969).

related costs raise due process questions.[6] The nature and content of the applicable requirements continue to stimulate lively interest.[7]

In addition to their doctrinal significance, the issues raised on this appeal are of nationwide practical importance. Forty-eight states and possessions, and the District of Columbia, have established class action procedures.[8] As to the matters in issue here, these procedures vary widely. A majority have adopted *ver-*

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6. *E.g., Eisen III, supra,* at 1009, n. 5, 1013, 1020 (Hays, J., concurring); *Berland v. Mack, supra,* at 131-132; *Cartt v. Superior Court,* 50 Cal. App. 3rd 960, 975 (1975). Amendments to Rules of Civil Procedure, Advisory Committee's Note, Rule 23, Fed. R. Civ. P., 39 F.R.D. 69, 98 (1966); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues,* 25 Hast. L.J. 1351, 1398-1399 (1974); Comment, *Cost Allocation in California Class Actions,* 13 Cal. W.L.Rev. 65, 80-81 (1976); Note, *Allocation of Identification Costs in Class Actions—Sanders v. Levy,* 91 Harv. L. Rev. 703, 711 at n. 60 (1978).

7. *E.g.,* Bennet, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy,* 1974 Wis. L. Rev. 801; Smith, *Class Action: State Notification Requirements After Eisen,* 8 West. St. U.L.Rev. 1 (1980); Note, *Allocation of Initial Notice Cost Under Federal Rule 23(c)(2),* 1973 U. Ill. L.F. 723; Note, *Civil Procedure—Class Action—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin,* 53 N.C. L. Rev. 409 (1974). *See generally,* Newburg, *Class Actions,* §§2350, 2375 (1977 Ed.), *passim.*

8. Citations to relevant provisions are appended as Appendix M at pp. 100a-101a, *infra.*

batim the language of Rule 23, Fed. R. Civ. P.[9] The remaining jurisdictions have chosen from seventeen different statutory or rule formulations.[10] In a number of states, significant recent enactments or revisions have taken place in obvious and often explicit reaction to this Court's decision in *Eisen IV*.[11] The resulting necessity for guidance from this Court is manifest.

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9. Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Indiana, Kentucky, Maine, Minnesota, Missouri, Montana, Nevada, Ohio, South Dakota, Tennessee, Texas, Utah, Virgin Islands, Vermont, Washington, Wyoming. *Ibid. Eisen IV*, however, is not necessarily controlling even in such jurisdictions, which are not bound by this Court's constructions of such language, except as to constitutional matters. *E.g., First Baptist Church v. Citronelle-Mobile Gatherine, Inc.*, 409 So. 2d 727 (Ala. 1981).

10. Arkansas, California, Florida, Illinois, Kansas, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania and Rhode Island have adopted unique statutes or rules. Georgia, Louisiana, Michigan, North Carolina, Puerto Rico and West Virginia have adopted the language of the 1938 version of Rule 23, Fed. R. Civ. P. Nebraska, South Carolina, and Wisconsin have adopted provisions derived from the New York "Field Code" of 1849. Iowa and North Dakota have adopted the Uniform Class Action Act.

11. Post-*Eisen IV*, Florida, Iowa, Maine, North Dakota, Oklahoma, Oregon and Texas have adopted legislation or rules consistent with the doctrine of that decision. Arkansas, the District of Columbia, Illinois, New Mexico, New York and Pennsylvania have rejected the *Eisen* approach as to notice, cost allocation or both matters.

Perhaps no state has sought as eagerly to distance itself from the requirements of *Eisen IV* as California. Among the leading authorities in this area is *Civil Service Employees Insurance Co. v. Superior Court*, 22 Cal. 3rd 362 (1978), which was a focal point of argument below. (*E.g., 34a-39a; 58a-61a; 73a-75a; 91a-93a*) *In Civil Service, supra*, the California Supreme Court, divided 4-3, upheld the imposition of notice costs on a class action defendant under section 1781(d) against a federal due process challenge. Over a vigorous dissent, the majority stated in *dictum* that such an expenditure could constitutionally be ordered even without a determination on the merits or any assurance of repayment. *Id.* at 375-378; 382-387 (dissent). The order before the Court on this appeal upholds actions fully in accordance with this view. The issues on this appeal thus come before this Court both briefed by the parties and energetically debated by the highest court of the relevant state.

The Deprivations of Due Process Are Clear

The constitutional inadequacy of the notice ordered below, as to the 50,000 or more class members who are "identifiable through reasonable effort," *Eisen IV, supra*, at 175, is beyond argument. "Notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable . . . " *Schroeder v. City of New York*, 371 U.S. 208, 212-213 (1962); *Mullane v. Central Hanover*

Bank & Trust Co., 339 U.S. 306, 315 (1950).[12] Class actions confer no exemption from this requirement. "[N]otice . . . is the touchstone of due process in a class action." *Eisen IV* at 176. Accordingly, as to tens of thousands of class members, some of whose individual claims may exceed $1,000 (24a), the "notice" ordered below is, in due process terms, no notice at all.

The cost allocation ordered below is equally infirm. Even minimal and temporary interference with property prior to a determination on the merits must result from hearing and determination "appropriate to the length or finality of the deprivation." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). *See, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). A permanent and final deprivation should therefore require, at a minimum, a determination guaranteeing a plaintiff at least some success on the merits in order to provide the required balance between the nature of the deprivation and the "process" appropriate to support it. *See, Paratt v. Taylor*, 451 U.S. 527, 540 (1981); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The payment of at least $23,000 by appellant ordered below cannot possibly meet the constitutional standards. The deprivation of appellant's property at

12. Even as to the more than 100,000 plaintiffs who cannot be identified, such notice is subject to significant questions, in view of the substantial nature of many categories of potential individual claims.

issue is substantial in amount, *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1978), and permanent in nature. P. 5, n. 2, , *supra*.[13] However, nothing approaching a determination appropriate to the nature of this deprivation has occurred. The Court has not in any way determined liability and has expressly disclaimed "an expression of any opinion . . . as to the merits of any claims or defenses . . . in this litigation." P. 5, *supra*. Even the class certification order, as in federal practice, is conditional and subject to revision. *Vasquez v. Superior Court*, 4 Cal. 3rd 800, 821 (1971); *accord, Dolgow v. Anderson*, 53 F.R.D. 664 (E.D.N.Y. 1971), aff'd. 464 F.2d 437 (2d Cir. 1972). Such preliminary and indeed non-existent "process" cannot constitutionally support the final and permanent deprivation ordered below.

On the bare facts of this case, the due process violations at issue are so plain and fundamental that summary reversal would be entirely appropriate. However, as demonstrated above, the nationwide importance of the questions presented and the thoroughness with which they have been addressed militate in favor of plenary consideration of this appeal.

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13. Indeed, as to the additional costs which appellant has been given the "right" to bear, "at its sole expense," p. 5, n. 3, *supra*, the deprivation on its face is absolute. *See, Oppenheimer Fund Inc. v. Sanders, supra*, at 361, no. 30.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of this appeal. In the alternative, review should be granted under 28 U.S.C. §2301.

Respectfully submitted,

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Of Counsel

May 1984

APPENDIX A

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 2, Civil No. A024519

In the Supreme Court of the State of California
IN BANK

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

v.

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO,
Respondent;

NOSSE et al., Real Parties in Interest.

Petition for hearing DENIED.

s/ Bird
Chief Justice

(Stamped "Supreme Court, Filed, February 1, 1984, Laurence P. Gill, Clerk")

APPENDIX "B"
OPINION DATED NOVEMBER 23, 1983

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION TWO

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, ET AL.,

Real Parties in Interest

BY THE COURT:

The petition for writ of mandate is denied.

(Rouse, J. is of the opinion the petition should be granted).

Dated November 23, 1983

s/
P.J.

APPENDIX "C"
ORDER DATED SEPTEMBER 6, 1983

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT 3

JOAN NOSSE, et al.,

Plaintiff,

vs.

VOLKSWAGEN OF AMERICA, INC.,

Defendant.

In Open Court September 6, 1983
No. 780-024

Plaintiffs' Motion for an Order Regarding Notice to Class and Allocation of Cost of Notice, heretofore submitted, is GRANTED as follows:

Notice in the form approved by the Court [5a-10a, *infra*] given by single publication in the San Jose *Mercury*, the Oakland *Tribune*, the San Francisco *Chronicle* and *Examiner*, the Los Angeles *Times*, the Los Angeles *Herald Examiner*, the San Diego *Union Tribune*, the Fresno *Bee*, the Bakersfield *Californian*, the Riverside *Press*, the Redding *Record Searchlight*, and in each additional newspaper included on the list attached to the Declaration of Samuel A. Krantz herein. The Notice must be at least one quarter of a page. The Re-

quest for Exclusion shall be in the form specified in the letter of Mark A. Chavez dated August 29, 1983. Plaintiffs shall advance 25% of the cost of such notice and defendant shall advance 75% of the cost of such notice.

Defendant shall have the right at its sole expense to cause additional notice to be given by publication or by direct mail, provided that counsel for the plaintiffs and the Court are advised in writing at least 10 days prior to the distribution of any such additional notice.

s/Stuart R. Pollak
STUART R. POLLAK
Judge of the Superior Court

**(CLASS NOTICE
CONFORMED TO ORDER DATED 9/6/83)**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO**

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendants.

NOTICE TO ALL PERSONS RESIDING IN CALIFORNIA WHO, AT ANY TIME BETWEEN MAY 7, 1976 AND MAY 1, 1979, OWNED A 1974-1980 VOLKSWAGEN MANUFACTURED RABBIT, DASHER, SCIROCCO, OR AUDI AND WHO HAVE REGISTERED SUCH VEHICLE WITH THE CALIFORNIA DEPARTMENT OF MOTOR VEHICLES.

1. Please take notice that on January 6, 1983, the Court hearing this case ordered that this action may proceed as a class action with the plaintiffs acting as representatives of the class of all persons fitting the description of vehicle owners set forth above. This notice is being sent to you since it appears that you may be a member of the class of persons described above and that you may be affected by the pendency of this action.

2. On May 7, 1981, the above-referenced class action was initiated by plaintiffs Joan Nosse, Jerry Kane, Katherine Fang and Tao Fang, Cliff Hoffman and Gwen Wong, on behalf of themselves and a class of persons subsequently ordered as fitting within the description of vehicle owners set forth above, against Volkswagen of America Inc. ("VWoA"), et al. The plaintiffs claim that VWoA is liable for damages allegedly sustained due to the installation of an allegedly defective valve stem seal in 1974-1980 Rabbit, Dasher, Scirocco and Audi model vehicles. The plaintiffs maintain that defects in this part caused excessive oil consumption, occasional engine seizure, excessive wear and tear and other related engine problems. On January 6, 1983, the Court ordered that this action will be permitted to proceed against defendant for: (1) breach of express warranty, (2) breach of implied warranty, (3) intentional misrepresentation—concealment, (4) negligent misrepresentation, and (5) unfair business practices. No damages are sought for any personal injuries, damages to the vehicle other than as mentioned above, or diminution in the value of your vehicle allegedly caused by the alleged defect.

3. In the event liability is established, the plaintiffs have asked the Court to award damages to an estimated 200,000 class members totaling $26 million. Plaintiffs' damage estimate includes $18,750,000 due to excessive oil consumption and $7,500,000 in consequential damages allegedly suffered by members of the class. According to plaintiffs' estimates, the average damage claim for each class member for excessive oil consumption may exceed $50.00 for each year that class members owned a vehicle covered by the class, until the valve stem seals were replaced.

This figure may vary depending on the length of ownership, number of miles driven and other factors. Additional consequential damages suffered by each class member, if any, will depend on actual out-of-pocket expenses they may have had on their vehicles, including replaced valve stem seals, parts, repairs, replaced engines, etc. Plaintiffs also seek to require defendant to replace all allegedly defective valve stem seals free of charge and request an award of punitive damages. The amount of any individual damages awarded will vary with the facts of each case and may only be nominal. Plaintiffs also seek reasonable attorneys' fees and costs, which plaintiffs' attorneys estimate will total less than $500,000. Plaintiffs' attorneys will attempt to obtain these fees and costs from VWoA in addition to any damage awards, but, if they are unable to do so, the fees and costs may have to be paid out of any total damage award. In the event plaintiffs are not successful in this action, plaintiffs' attorneys will not be entitled to recover any attorneys' fees or costs. In no event will members be asked to contribute to any such fees or costs.

4. VWoA denies all liability. It claims that any damage sustained by plaintiffs was a resulf of their own negligence and careless use, operation, maintenance and service of the vehicles. VWoA also maintains that the valve stem seals referred to were not defective. In addition, VWoA raises defenses to plaintiffs' claims including the defense that plaintiffs' claims are barred by various applicable statutes of limitation and that plaintiffs delayed for an unreasonable length of time in asserting their claims against VWoA.

5. THE COURT'S ORDER THAT THIS ACTION MAY PROCEED AS A CLASS ACTION IS NOT A DETERMINATION OF THE MERITS OF ANY OF THE CLAIMS ASSERTED BY THE PLAINTIFFS AND IS ONLY A PRELIMINARY PROCEDURAL DETERMINATION AS TO THE POTENTIAL PARTIES INVOLVED. This notice is not to be understood as an expression of any opinion by the Court as to the merits of any claims or defenses made by either side in this litigation. It is sent to you for the purpose of informing you of the pendency of this litigation so that you may make appropriate decisions as to the steps you may wish to take in relation to this lawsuit.

6. You may choose whether or not to be a member of the class in this action. If you decide to remain part of the class, you will be eligible to participate in the benefits of the judgment, in the event plaintiffs are able to prevail. In this event, you need do nothing more, and plaintiffs' present counsel will represent your interests. If you choose to remain a member of the class, you will be bound by any adverse decision. You also have the option, if you decide to remain a member of the class, to ask the Court for permission to appear as a named class co-representative and/or, if you so desire, enter an appearance through counsel of your own choosing. If you choose not to be a member of the class, you may file an individual action or pursue alternative remedies for any claim that you might have.

Anyone who does not want to be a member of the class in this case may exclude himself from the class and the action by giving written notice on the coupon at the end of this Notice and mail it to:

Clerk of the Superior Court
City and County of San Francisco
Post Office Box Number
San Francisco, California 94

Unless it is submitted, you will be bound by the judgment in this case whether favorable or unfavorable. It must be submitted on or before to be effective.

8. If you do not request exclusion from the class or if you do not appear through counsel of your own choosing, the counsel for plaintiffs will represent your interests in this lawsuit. Plaintiffs are represented by:

Gilbert T. Graham, Esq.
240 Stockton Street, Suite 300
San Francisco, CA 94108

William Weiner, Esq.
465 California Street, Suite 400
San Francisco, CA 94104

VWoA is represented by:

Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, CA 94104

DATED: 1983

HON. STUART R. POLLAK
Judge of the San Francisco
Superior Court

REQUEST FOR EXCLUSION

I (we) do not wish to be a member of the class of persons on whose behalf *Nosse v. VWoA,* No. 780-024 (S.F.Sup. Ct.) is being maintained, nor to participate in any capacity in the case, nor to be bound by any judgment therein.

First Name	Middle Initial	Last Name

Street Address

City	State	Zip Code

Signature

APPENDIX "D"
LETTER FROM PILLSBURY, MADISON & SUTRO DATED MARCH 28, 1984

March 28, 1984

Volkswagen of America, Inc.
Litigation — Nosse

Mr. Laurence P. Gill
Clerk, Supreme Court
Room 4250 State Building
San Francisco, CA 94102

Dear Mr. Gill:

Enclosed is the original and fifteen copies of a Notice of Appeal that we have prepared for filing in your court. Please file the original and fourteen copies and return a file stamped copy to me in the enclosed envelope.

Although we have previously been advised that the California Supreme Court will not accept the Notice of Appeal for filing, we believe that it may have to be filed in the California Supreme Court in order to comply with the rules for taking an appeal to the United States Supreme Court. In order to protect our right of appeal, therefore, we are requesting that you accept this document for filing.

If you decline to file the Notice of Appeal, I would greatly appreciate it if you would explain why the Notice of Appeal cannot be filed in the California Supreme Court.

Thank you for your assistance and cooperation in this matter.

Very truly yours,

s/Mark A. Chavez
Mark A. Chavez

Enc.

APPENDIX "E"
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

PLEASE TAKE NOTICE that *VOLKSWAGEN OF AMERICA, INC.* ("VWoA"), the petitioner and defendant in this action, hereby appeals to the Supreme Court of the United States from the Order re Notifying Class Members entered by the Superior Court, the Order of the Court of Appeal denying VWoA's Petition for Writ of Mandate and the final Order entered by the Supreme Court of California on February 1, 1984 denying VWoA's Petition for Hearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. section 1257(2).

Dated: March 28, 1984

PILLSBURY, MADISON & SUTRO
WALTER R. ALLAN
W. ROBERT BUXTON
MARK A. CHAVEZ

By s/Mark Chavez
Attorneys for Appellant
and Defendant
Volkswagen of America, Inc.

HERZFELD & RUBIN
DANIEL V. GSOVSKI
40 Wall Street
New York, N.Y. 10005

Of Counsel

(Stamped "Received, 84 Apr. 10,
p. 2:29, Supreme Court, San Francisco")

APPENDIX "F"
NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

PLEASE TAKE NOTICE that *VOLKSWAGEN OF AMERICA, INC.* ("VWoA"), the petitioner and defendant in this action, hereby appeals to the Supreme Court of the United States from the final Order entered by the Supreme Court of California on February 1, 1984 denying VWoA's petition for Hearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. section 1257(2).

Dated: February 9, 1984

PILLSBURY, MADISON
& SUTRO
WALTER R. ALLAN
W. ROBERT BUXTON
MARK A. CHAVEZ

By s/Mark A. Chavez
Attorneys for Appellant
and Defendant
Volkswagen of America, Inc.

HERZFELD & RUBIN
DANIEL V. GSOVSKI
40 Wall Street
New York, N.Y. 10005
Of Counsel

(Stamped "Filed Feb. 10, 1984, Court of Appeals,
First App. Dist., Clifford C. Porter, Clerk")

APPENDIX "G"
PETITION FOR HEARING

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

To the Honorable Rose Elizabeth Bird, Chief Justice of California, and to the Honorable Associate Justices of the Supreme Court of the State of California:

A hearing should be granted because:

1. The trial court's order permanently deprives petitioner of property without a determination on the merits or adequate security, thus violating petitioner's right to due process of law. To the extent that section 1781(d) of the California Civil Code

authorizes the order below, the section contravenes the due process clauses of the Federal and California Constitutions. This Court has consistently held that prerogative writs should issue where such important rights are violated and such fundamental issues are raised.

2. This proceeding also raises an important question of first impression of general significance for class action litigation throughout the state, i.e., what procedural safeguards must be afforded to a class action defendant before it can be constitutionally required to bear all or part of the costs of class notice.[1]

STATEMENT OF THE CASE

This is a class action brought on behalf of certain current and former owners of 1974-1979 model year automobiles distributed by Volkswagen of America ("VWoA"). Plaintiffs claim that "many" valve stem seals (internal engine parts) in vehicles were insufficiently long-lived (Appendix to Petition for Writ ("App."), p. 42). The complaint requests twenty-six million dollars in damages for the cost of "excessive" oil consumption caused any class member by those seals, repair costs for engine damage, if it occurred, and for other incidental and consequential damages if caused by defective valve stem seals in a particular vehicle (App., pp. 11-12, 13, 18-19).

On September 6, 1983, after briefing and argument by the parties, respondent court ordered that class notice be given by a single publication in newspapers circulating throughout California (App., p. 419). The total publication costs are estimated by real parties to be in excess of $30,000 (App., p.

407-409). Although there was no hearing or determination on the merits, VWoA was ordered to "advance" 75 percent of the costs of that notice, *i.e.*, to expend at least $23,000 on behalf of the real parties, *without* security. Apparently, the respondent court relied, without saying so, on section 1781(d) of the Civil Code.

Moreover, there has never been any showing or determination that real parties will ever be able to bear their own costs if they fail to prevail on the merits in this case. Nevertheless, respondent refused to require any security.

Petitioner timely sought a writ of mandate from the Court of Appeal to obtain appellate review of respondent court's class notice order. The Court of Appeal ordered real parties to file a response to the petition. After considering the petition and the response, the Court of Appeal, with one justice dissenting, denied the petition on November 23, 1983 (Exh. A).

ARGUMENT

* * *

II. THE CLASS NOTICE ORDER PERMANENTLY DEPRIVES PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Due process prohibits any taking of property without "notice and opportunity for hearing appropriate to the nature of the case" (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313). Whether due process requirements are met in a particular case is analyzed in two stages. First, it must be determined whether a constitutionally protected interest is taken (*Logan v. Zimmerman Brush*

Co. (1982) 455 U.S. 422, 428). Second, there must be a determination that the process by which the protected interest is taken i[s] constitutionally adequate (ibid.). In the present case, both the presence of a protected interest and the absence of the constitutionally required process are manifest.

A. The Class Notice Order Permanently Deprives Petitioner of its Constitutionally Protected Property.

Although by its literal terms the class notice order only directs VWoA to "advance" 75 percent of the notice costs, the practical effect of the order is to permanently deprive VWoA of at least $23,000.[2] Petitioner's property interest in $23,000 is entitled to the same due process protection as any other property interest (*North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 608).[3]

The final and permanent nature of the deprivation here is underscored by respondent court's failure to require real parties to post a bond or other appropriate security for the notice costs. Thus, petitioner is left without any protection against substantial financial loss even if it prevails on the merits or the respondent court's certification order is later modified or rescinded. Far less substantial and permanent deprivations have been uniformly held subject to due process standards, *e.g., Snaidach v. Family Finance Corp.* (1969) 395 U.S. 337; *Macallop v. Carberry* (1970) 1 Cal. 3d 903 (wage garnishment); *Fuentes v. Shevin* (1972) 407 U.S. 67 (replevin of household goods); *North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601 (prejudgment attachment of property securing a com-

mercial deed); *Blair v. Pitchess* (1971) 5 Cal. 3d 258 (claim and delivery); *Randone v. Appellate Dept.* (1971) 5 Cal. 3d 536 (prejudgment attachment of checking accounts).

B. The Deprivation Does not Comply with the Requirements of Procedural Due Process

This action is still at a preliminary stage. No proceedings on the merits have been held, there has not been a presentation of contested evidence or even a preliminary determination on the merits. Even the class certification order is conditional and subject to revision (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821). Nevertheless, petitioner is ordered to make a substantial expenditure with virtual certainty that it will never recover a penny of those funds should it prevail.

In every case involving a deprivation of property, the interests that are affected must be weighed to determine the precise nature of the hearing required to satisfy due process (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334-335). The United States Supreme Court has identified the factors which must be considered in this process:

> "These include the importance of the private interest and the length or finality of the deprivation [citations omitted], the likelihood of governmental error [citation omitted], and the magnitude of the governmental interests involved" (*Logan v. Zimmerman Brush Co.*, supra, 455 U.S. at 435).

In assessing these specific factors, the courts should further bear in mind the overriding purpose of due

process in protecting "the particular interests of the person whose possessions are about to be taken" (*Fuentes v. Shevin,* supra, 407 U.S. at 90, n. 22).

These factors demonstrate the unconstitutionality of the "process" afforded petitioner. The "private interest" at stake here is petitioner's fundamental right to its property. Deprivation of this interest will be final. Even if VWoA prevails on the merits, it will be unable to recover any of the funds expended on class notice. In view of the absence of any determination or even a preliminary consideration of the merits, the outcome of this action is as much in doubt as on the day it was filed. There is, accordingly, a strong "likelihood of governmental error."

Under the circumstances, due process requires that a determination guaranteeing real parties at least some success on the merits must precede a permanent cost-shifting decision (see *Armstrong v. Manzo* (1965) 380 U.S. 545, 552; *Pratt v. Taylor* (1981) 451 U.S. 527, 540). *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, the only California case sustaining the imposition of notice costs upon a class action defendant, fully supports this view. The defendant insurer in that case disclaimed coverage under a medical expense clause. Plaintiff successfully moved for partial summary judgment on that issue. "As a practical matter this motion requested the court to resolve the principal legal issue presented by the case" (22 Cal. 3d at 369). The trial court's grant of partial summary judgment rendered the subsequent class notice order "invulnerable" to a procedural due process challenge because it "realistically assured the plaintiff class at least a partial victory in its lawsuit" (22 Cal. 3d 381).[4]

By contrast, there have not been any proceedings or determinations on the merits in this case. Constitutionally, no "hearing appropriate to the nature" of the final deprivation in this case has been held (see *Mullane v. Central Hanover Bank and Trust Co.*, supra, 334 U.S. at 313). At the very minimum, a hearing should have been conducted under the standards applied in preliminary injunction hearings. Before issuing a preliminary injunction, the trial court must consider whether defendant will suffer greater injury from granting preliminary relief than plaintiff from its denial *and* whether there is a reasonable possibility plaintiff will prevail on the merits. (See *People v. James* (1981) 122 Cal. App. 3d 25, 39). Even when those determinations are in favor of an injunction, the injunction cannot issue without a bond (Code Civ. Proc., §529) (Footnote omitted). The fundamental fairness which is the essence of due process of law require no less here.

Because of its failure to meet the procedural standards required for a permanent deprivation of property, or to provide adequate security against such deprivation, the respondent court's cost-shifting order must be reversed. To the extent that Civil Code, section 1781 (d) authorizes the cost-shifting order made below, it violates the Federal and California Constitutions.

* * *

IV. IN ADDITION, THE NOTICE ORDERED IS LEGALLY AND CONSTITUTIONALLY INADEQUATE

Respondent court ordered notice to the class by a one-time publication in newspapers which should, in the aggregate, circulate in all California counties. Such notice is insufficient to satisfy the governing legal standards.

As a general rule in class actions, individual notice of the nature and pendency of a case is required (*Cooper v. American Savings & Loan Association* (1976) 55 Cal. App. 3d 274, 285; *Kass v. Young,* supra, 67 Cal. App. 3d 100, 106). Notice by publication is permissible only where the "class membership is huge, the damages are minimal and res judicata and other problems * * * are insignificant" (*Cooper v. American Savings & Loan Ass'n,* supra, 55 Cal. App. 3d at 285). Conversely, where there is a real prospect of multiple litigation over the class action claims, individual notice is "essential" to protect the interests of absent class members and the court (see *Cooper v. American Savings & Loan Association,* supra, 55 Cal. App. 3d at 285-286; *Cartt v. Superior Court,* supra, 50 Cal. App. 3d at 969, 972-973).[7]

The damages claimed on behalf of class members in this action are far from minimal (App., pp. 11-12, 13, 42). According to real parties, the damages for "excessive" oil consumption alone may amount to several hundred dollars for each of the estimated 200,000 class members (App., p. 397). Damages claimed for engine damage may exceed $1,000 for some individuals (App., p. 4). In addition, the real parties claim $7,500,000 in consequential damages for the class (App., p. 42).

Thirty actions have been filed against VWoA facially raising claims encompassed within real parties' complaint (App. pp. 284, 294-297). Some of these actions were filed after the initiation of the instant case. There is both a present reality of multiple litigation and a concrete prospect of future litigation involving the class action claims.

Under the circumstances, individual notice should be required to protect the interests of absent class members whose rights will be adjudicated in this action and to preserve the integrity of the class action process. The class notice ordered by the respondent court neither protects the due process rights of class members nor preserves the integrity of the class action process. (Footnote omitted).

* * *

FOOTNOTES

1. This proceeding raises additional issues concerning the standards that must be applied in imposing notice costs upon defendants and ordering class notice. To the extent that section 1781(d) of the Civil Code authorizes discretion to impose notice costs or the notice ordered in this case, it unconstitutionally deprives petitioner and absent class members of due process of law. The lower courts need appellate guidance on these issues.

2. Real parties argued, somewhat disingenously, before the Court of Appeal that there is nothing to suggest that the deprivations would in fact be permanent. In fact, there are no feasible means of recovering notice costs from the individual members of an unsuccessful class action. The amount of the costs that may be assessed against each member of the class are so small that it would be prohibitively expensive to pursue a collection action against any of the individuals. Moreover, the individual named plaintiffs have repeatedly represented to the trial court that they do not have the financial resources to bear notice costs. If these representations are correct, it is extremely unlikely that VWoA will recover its notice costs.

3. The obvious constitutional implications of the absence of any realistic possibility of reimbursement for ostensibly "interim" cost-shifting orders in class actions has been recognized by courts and commentators (see, e.g., *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 975; *Eisen v. Carlisle & Jacquelin* (1973) 479 F.2d 1005, 1009 at n. 5 1013, 1020 (Hays, J., concurring) (2d Cir.), affirmed (1974) 417 U.S. 156; *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132; McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues* (1974) 25 Hast. L. Jour. 1351, 1398-1399); Recent Developments, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice*

Costs in Class Action Rejected (1973) 73 Col. L. Rev. 1641, 1653-1655; Note, *Allocation of Identification Costs in Class Actions, Sanders v. Levy* (1978) 91 Harv. L. Rev. 703, 711 at no. 60; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. W. L. Rev. 65, 80-81).

4. *Civil Service,* supra, contains *dicta* on the broader constitutional question of the proprietary (sic) of cost-shifting in class actions. Much if not all of that discussion, however, is not applicable here. In fact, the four member majority opinion is largely concerned with substantive due process issues not raised here, and not even thoroughly argued by the parties in *Civil Service.* Since procedural due process was clearly satisfied by partial summary judgment for plaintiffs, *Civil Service* should not be read as controlling beyond the facts of that case.

* * *

7. This rule is fully and explicitly in accord with Federal constitutional considerations underlying the United States Supreme Court's guidelines for notice under Rule 23, Federal Rules of Civil Procedure. Specifically, that court has emphatically endorsed the statement by the drafters of federal Rule 23 that the requirement of individual notice in damage class actions is specifically designed to fulfill Federal due process requirements (*Eisen v. Carlisle & Jacqueline* (1974) 417 U.S. 156, 173-174). Notice is the "touchstone of due process in a class action" (*id.,* at 176). Lastly, the court categorically rejected the notion that forcing a reluctant defendant to expend funds to finance a case against itself could be justified by *res judicata* considerations:

> "We also note that the representative plaintiff in [*Eisen,* supra], argued, without success, that the defendants should pay part of the cost of notice because of the supposed res judicata benefits to them

from class-action treatment. [citation omitted] We did not think then, nor do we now, that an unwilling defendant should be forced to purchase these 'benefits' " (*Oppenheimer Fund Inc. v. Sanders* (1978) 437 U.S. 340, n. 30 at 361).

APPENDIX "H"

OPPOSITION TO PETITION FOR WRIT OF MANDATE

COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

VOLKSWAGEN OF AMERICA, INC.,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Real Parties in Interest.

OPPOSITION TO PETITION FOR WRIT OF MANDATE

INTRODUCTION

The Petition for Writ of Mandate filed herein contends that Petitioner has been deprived of due process by an order of Respondent Court ordering publication of a class action notice in 62 different newspapers reaching every county in California, with Petitioner

being given the right to notify other class members by mail or other means if it wishes to do so, and dividing the costs of publication by a ratio of ¾ to Petitioner and ¼ to plaintiff class members. Real Parties submit that said Petition raises no new or novel issues which have not already been determined by California courts, and that, contrary to Petitioner's assertion, all of the primary issues herein have already been determined in the seminal case of *Civil Service Employees Insurance Company v. Superior Court* (1978) 22 C. 3d 362. Real Parties submit that neither the method of notice nor the allocation of costs of notice can possibly constitute an abuse of discretion by Respondent Court.

STATEMENT OF THE CASE

* * *

On March 2, 1983, plaintiffs filed a motion for an order regarding notice to class and allocation of costs. In support of said motion, Real Parties pointed out the favor in which consumer class actions are viewed by the California Legislature and appellate courts, and emphasized that the primary benefit of the notice of class action at this stage of the proceedings is to the courts and the defendant, in that once a binding class judgment is entered other plaintiffs with similar grievances will not be able to burden the already-congested courts with similar claims, and the decision would act as *res judicata* on similar claims presented against the defendant. Real Parties noted that the California Supreme Court had specifically ruled in *Civil Service Employees Insurance Company v. Superior Court, supra,* that "in California, in contrast to the federal realm, the Legislature has specifically

authorized the trial courts in class actions to impose the costs of notice upon either the plaintiff or the defendant." *Id.*, at 376.

In support of their motion, Real Parties attached declarations of the plaintiffs stating that in view of the probable cost, and "because of my limited financial resources and the relatively small amount of damages which I personally am claiming in this action, I am financially unable to carry the burden of paying for notice to the class in this action." Appendix, pp. 72-77. Real Parties also attached as exhibits information on the cost of direct mailing and publication; certified records of the complaint issued by the Federal Trade Commission on April 1, 1981 against Volkswagen of America, alleging that "an abnormally high number of Volkswagen and Audi vehicles sold in the United States beginning in 1974 model year and continuing at least through the 1979 model year and equipped with water-cooled engines have experienced, are experiencing, or are likely to experience" engine problems which may require extensive engine repairs when high rates of oil consumption are experienced, including but not limited to replacement of valve stem seals, replacement of cylinder heads, or other valve repairs. Appendix, pp. 79-81, and supporting papers; Appendix pp. 82-97; and papers documenting the proceeding against VWOA before the Environmental Protection Agency, including a recall by the Agency for VWOA's failure to meet federal emission standards. Appendix, pp. 98-105.

Plaintiffs' motion was also based upon all the pleadings, papers and records on file in this action, which included all of the voluminous materials attached to plaintiffs' previous motion for class certification.

This evidence also included the recall that VWOA had undertaken for 1977-1979 Rabbits and Sciroccos, wherein it adopted a nationwide program agreeing to replace the valve stem seal which is being challenged as defective in this action, and to compensate any owners who had previously replaced said part for up to $125. See Appendix, p. 56, citing memo on class certification and accompanying footnotes. (Footnote omitted).

Further evidence of the merits of plaintiffs' class claims was the fact that ever since VWOA changed the type and composition of valve stem seals placed in their vehicles in the April, 1979 production, replacement figures indicate that the problem with excessive oil consumption and related loss had ceased to exist. (Appendix, p. 56). (Footnote omitted).

In an attempt that Real Parties' counsel regarded as harassment and intimidation, VWOA's attorneys then attempted to depose all of the class representatives and ask them extremely detailed and personal questions, basically constituting a post-judgment creditor's examination. (Footnote omitted). VWOA then filed a motion to compel responses to said questions, which Real Parties vigorously opposed. (Footnote omitted). Respondent Court ruled as follows:

> "It seems to me much more important than the analysis of this individual's financial resources in an analysis of the amount of the claim in relationship to the cost involved and the number of parties to whom notice is going to be given, and so forth. And it just seems to me the answers to these questions about this person's financial resources are of really marginal relevance to a proper determination of what to do about notice." Appendix, p. 190.

The Court then ordered the six declarations of plaintiffs stricken, and references to their financial capabilities in the Memorandum of Points and Authorities similarly stricken. Petitioner did not seek reconsideration or appellate review of said Order, either then or in its present Petition for Writ of Mandate.

THE CLASS NOTICE ORDER

On September 6, 1983, Respondent Court ordered that class notice be given by a single publication at least one-quarter of a page in size in 62 different newspapers registered as official publications in all 52 counties in California. (Footnote omitted). This Order followed substantial briefs on all of the questions involved, and multiple hearings before the court on all of the various issues raised by the motion. The Court eventually ordered that "plaintiffs shall advance 25% of the cost of such notice and defendant shall advance 75% of the cost of such notice." Appendix, p. 419. The Court also ruled:

> "Defendant shall have the right at its sole expense to cause additional notice to be given by publication or by direct mail, providing that counsel for the plaintiffs and the court are advised in writing at least 10 days prior to the distribution of any such additional notice." (Footnote omitted)

ARGUMENT

* * *

II

PETITIONER IS NOT DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE CLASS NOTICE ORDER CHALLENGED HEREIN

Petitioner contends that it will be deprived of due process by Respondent Court's order, based first upon its contention that said order permanently deprives Petitioner of its constitutionally protected property (Petitioner's memorandum, p. 12), and that "VWOA has virtually no chance of recovering there (sic) costs at the conclusion of the litigation." *Id.* Petitioner has absolutely no evidentiary support for said contention as a factual matter, since there is no evidence in the record at all whether or not costs could be recovered by VWOA should they be legally entitled to them.[7] The only evidence pertaining to financial capabilities was stricken by the court upon defendant's motion, and it is noteworthy that Petitioner does not seek in its Petition to reverse the court ruling which refused to compel Real Parties to provide detailed financial information in response to discovery. Thus, Petitioner does not even meet its burden of proving that it will be permanently deprived of property by the order.[8]

Petitioner next takes a quantum leap of logic by arguing that the "final and permanent nature of the deprivation is guaranteed by respondent court's failure to require Real Parties to post a bond or other appropriate security for the notice costs." Petitioner's Memo, p. 13. In addition to the *non sequitur* posited,[9] Petitioner fails to cite a single precedent involving a class action for this radical proposition. Petitioner also did not strenuously argue this point below, failing to file a motion to require plaintiffs to post a bond, or

even to make a major argument in the extensive briefs filed on the issues involved.[10]

Petitioner next argues that procedural due process has been violated by Respondent's order which it contends fails to provide a "meaningful" determination or adjudication on the merits prior to a cost allocation decision. (Petitioner's memo, pp. 14-16). In *Civil Service,* the California Supreme Court addressed the very issue which Petitioner raises. Part 2 of the *Civil Service* opinion states the issue and the answer in the argument heading to said section:

> "(Paragraph 2) The trial court did not violate defendant's due process rights in ordering it to bear the initial costs of notifying the plaintiff class of the pendency of the action." *Civil Service,* 22 C. 3d at 374.

The Court continued:

> "In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the costs of notice upon either the plaintiff or the defendant. Civil Code §1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class actions, explicitly provides that 'if the action is permitted as a class action, the court may direct *either party* to notify each member of the class of the action.' " 22 C. 3d at 376.

The Court also indicated that previously it had approved the authority of California trial courts to impose notice costs on either party, plaintiff or defendant, in a class action, in *Vasquez v. Superior Court* (1971) 4 C. 3d 800, 820. *Civil Service Employees Insurance Company v. Superior Court, supra,* 22 C. 3d at 376.

The Court in *Civil Service* also specifically held that a trial court order authorizing the imposition of notice costs upon a defendant was not a violation of either procedural or substantive due process. 22 C. 2d at 377. The Court reasoned that the adoption of efficient class action procedures unquestionably rationally relates to the vindication of a wide range of legitimate public purposes, including protection of unwary customers from being duped by unscrupulous sellers; producing a therapeutic effect upon those sellers who indulge in fraudulent practices; aid to legitimate business enterprises by curtailing illegitimate competition; and avoidance to the judicial process of the burden of multiple litigation involving identical claims. *Id.* The Court continued, in a holding directly controlling the present Petition:

> "A class action procedure authorizing the trial court to impose notice costs upon a defendant in a particular case serves the same general public policy. In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying all absent members of the pendency of the action. (Citations omitted). Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the plaintiff's case. (Citations omitted). In light of the public interest in establishing a procedure that permits such actions to be decided on their merits, such a cost-shifting procedure is neither arbitrary nor irrational and does not abridge substantive due process guarantees." *Civil Service Employees Insurance Company v. Superior Court, supra,* 22 C. 3d at 377-378.

The Court in *Civil Service* continued by noting that court orders which require a defendant, prior to judgment, to bear some litigation expenses which may aid the plaintiff's lawsuit are "by no means unusual," such as "widely used civil discovery procedures:"

> "Indeed, class action notice costs are quite analagous to discovery costs, for much of the expense typically identified with the costs of notice relates to the identification of class members from defendant's records, and defendants have frequently been required to provide such identification under traditional discovery procedures. (Citations omitted.)" *Id.* at p. 378, fn. 9.

The Court also held that there is no denial of procedural due process by such an order, "even assuming that such a taking is involved here," since "recent decisions have affirmed that a deprivation is clearly constitutional if, prior to the taking, the party facing deprivation obtains notice and a meaningful hearing as to the propriety of the deprivation. (See, *e.g.*, *Skelley v. State Personnel Board* (1975) 15 C. 3d 1984, 208-211; *Beaudreau v. Superior Court* (1975) 114 C.3d 448, 458-459.)" *Id.* at 379. The Court held that the meaningful hearing requirement was met when the trial court provided a full hearing on the issues of who should bear the costs of notifying absent class members of the pendency of the suit. The Court found that where defendant was provided a complete opportunity to argue against plaintiff's request that defendant bear the initial costs of notice burden, "under these circumstances we must assume that the trial court considered the wide range of factors that other courts have identified as relevant to the cost allocation decision (citations omitted) and, in light of such factors, exercised its discretion in favor of requiring defendant to bear the cost of notice." *Id.* at 380. In the

present case below, all of the relevant factors set forth in the applicable case law were argued at length by the parties, both in their briefs and in open court. In light of this clear holding of *Civil Service*, Petitioner's due process argument is without merit.

Petitioner's slim if not only hope for a distinction from *Civil Service* is its argument that in that case, the plaintiff had already moved for a partial summary judgment on an affirmative defense, so that the plaintiff class was realistically assured at least a partial victory in its lawsuit. (Petitioner's memo, pp. 15-16).

However, there is no question that the factor cited by Petitioner was dictum in *Civil Service* and unnecessary to its decision. The Court first ruled out defendant's argument that despite the fact that it was afforded full notice and a hearing on the costs of notice issue, procedural due process requisites were not satisfied because the court order shifted the initial costs of notice prior to the court's final determination of the merits of the action:

> "As the numerous statutory procedures governing the imposition of discovery and expert witness costs illustrate, however, procedural due process is not offended by court order which—after notice and hearing on the factors relevant to the interim costs allocation decision—imposes some of the ongoing litigation costs on a defendant without a final determination on the merits of the case. Although, as the decisions cited above indicate, the trial court's preliminary view of the strength of plaintiff's claim may be a proper factor in the court's allocation of notice costs, a final judgment on the merits is not a due process prerequisite to an interim court order imposing litigation costs on a defendant (*c.f., Oppenheimer Fund Inc. v. Sanders, supra*, 437 U.S. 340).

> "*Moreover,* the trial court order in the present case is particularly invulnerable to a procedural due process challenge for, as we have seen, at the time the trial court issued the order the court had already rendered partial summary judgment for plaintiff on two of the principal legal issues raised in the case . . . " *Civil Service Employees Insurance Company v. Superior Court,* 22 C. 3d at 380-381. (Emphasis added).

Petitioner admits that prior determinations of merit are "probably not permissible, in that 'class actions must be resolved' prior to any determination of the action (citations omitted)." Petitioner's memo, p. 14, fn. In fact, in *Civil Service* the defendant argued that the trial court had entered an order violating its rights to due process by passing on the merits of a plaintiff's substantive claim in a class action before notification of the pendency of the action to absent class members, citing *Home Savings & Loan Association v. Superior Court* (1975) 42 C.A.3d 1006; *Home Savings & Loan Association v. Superior Court* (1976) 54 C.A.3d 208; and *People v. Pacific Land Research Company* (1977) 20 C.3d 10, 16, which held that "the defendant in a class action has a due process right to secure a determination of the issues relating to the suitability of the action as a class matter as well as the composition of the class and the form of notice to the members, prior to determination of the merits of the action." The reason for this holding, as explained in *Pacific Land Research* and set forth in *Civil Service,* is that "unless a decision on the merits is postponed until after the class issues are decided, a defendant is subject to "one way intervention" which would allow potential class members to elect whether to join in the action depending upon the outcome of the decision on the merits." *Civil Service,* at 372. However, the Court in *Civil Service* avoided this issue by holding that defendant therein had waived whatever rights it

might be afforded by the *Home* decision, since it did not object to the trial court's entertainment of the motion prior to the class certification.

Thus, Petitioner's argument that it is deprived of due process by an order which shifts the cost of notice prior to a determination of the merits, while at the same time arguing that there cannot be a determination of merits prior to a determination of the class issues, is both circular and vacuous. Said argument would limit the principles of *Civil Service* to the singular and rare instance where a defendant had waived a prior determination of merits before the determination of class issues.

In a last straw argument, Petitioner asserts that "at the very minimum, this hearing should have been conducted under the standards applied in preliminary injunction hearings." (Petitioner's memo, p. 16.) One of the factors which was determined by the court below was the merit of plaintiffs' claim, which was extensively briefed and argued by both parties, and Respondent necessarily made a determination regarding the "merit or lack of merit in the claim" (*Cartt v. Superior Court* (1975) 50 C.A.3d 960, 974, fn. 21), which would be similar to that found in a preliminary injunction hearing. As with most of the other novel issues asserted by Petitioner, it has no case authority whatsoever in support of this proposition. It is submitted that the case law regarding the applicable factors to be considered is sufficiently well developed to allow proper guidance to the trial courts, without adoption of a new and foreign concept in determining said issues.

***

IV.

THE NOTICE ORDERED BY RESPONDENT COURT IS LEGALLY ADEQUATE AND NOT CONSTITUTIONALLY REQUIRED.

It is clear that, unlike the federal forum and Federal Rule of Civil Procedure 23, California law does not require individual notice to members of the class. *Archibald v. Cinerama Hotels* (1976) 15 C.3d 853, 861; *Cartt v. Superior Court, supra,* 50 C.A.3d at 975.

The Court below ordered publication of one-quarter page in 62 different newspapers, registered in every county in California. This is estimated to cost approximately $30,000. In addition, the court gave defendant the right to mail individual notice if it chose to do so at its own expense, since it apparently keeps records of all current owners of VW-manufactured automobiles. This option is similar to that set forth by Justice Kaus in *Cartt v. Superior Court, supra:*

> "This, of course, would not prevent Standard from stuffing at its own expense if it desires to do so. If Standard is sincerely troubled about the *res judicata* effect of this litigation, it should be permitted to buy as much protection against future claimants as it thinks it needs." 50 C.A.3d at 974.

Under the option given by the Respondent Court, Petitioner has the right to cause additional notice to be given by *publication* or by *direct mail,* thereby giving a complete answer to Petitioner's argument that the first portion of the order neither protects due process rights of class members nor preserves the integrity of the class action process.

Petitioner's argument that Respondent's order for a single publication violates the Consumer Legal Remedies Act is to no avail, since Civil Code §1781, subdivision (d) *permits* notice by publication in accordance with Government Code §6064, rather than *requires* the four consecutive weeks provided in said section. It is clear that the large publication ordered by Respondent, with the likely press coverage incidental thereto,[14] is sufficient to provide meaningful notice to the class members involved.

Finally, it is Real Parties' contention that due process does not require notice to absent class members; *a fortiori*, any notice, and in particular the notice ordered by the Respondent, fully satisfies the Constitution.

In its seminal decision in *Handsberry v. Lee* (1940) 311 U.S. 32, the United States Supreme Court unequivocally held that due process is satisfied in a class action when the named party adequately represents the interests of absent class members. It is adequacy of representation, rather than notice of the pendency of the action, that satisfies due process.

In *Handsberry*, plaintiff property owners sought to enjoin a violation of a restrictive covenant by defendant property owners. The defendants successfully argued that a prior class action suit on identical issues was *res judicata*. The Supreme Court reversed. Instead of relying upon the fact that notice was not provided to the absent class members in the first class suit, the Court held that the original suit violated due process because that class was not adequately represented and thus *res judicata* could not be used as a defense by the defendants in the second suit.

The Court recognized the general Anglo-American rule of jurisprudence which requires notice to be provided to those who would be bound by the judgment. However, the Court identified class suits as an exception to these general rules by stating at 41-43:

> "In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.
>
> . . .
>
> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."

Leading commentators agree that it is adequacy of representation, not notice, that satisfies due process. See 3 B.J. Moore, *Federal Practice* §23.55 at 1152-53 (2d Ed. 1969); 7 A.C. Wright & A. Miller, *Federal Practice and Procedure* §1786, at 142-44 (1972). Directly on point and following the contention of Real Parties is *Gant v. City of Lincoln* (Neb. 1975) 225 N.W.2d 549. See also, *Lowry v. Obledo* (1980) 111 C.A.3d 14, 169 Cal. Rptr. 732.

The argument contrary to Real Parties' view is that *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306 and *Eisen v. Carlisle & Jacqueline* (1974) 417 U.S. 156 [*Eisen IV*] hold that due process requires notice to absent class members.

The widely-held view, and the view held by the California courts, is that *Eisen IV* merely interpreted

Fed. Rule Civ. Proc., §23 rather than the Constitution. *Civil Service Employees Insurance Company v. Superior Court* (1978) 22 C.3d 362; *Cartt v. Superior Court* (1975) 50 C.A.3d 960.

Mullane, supra, is not constitutional authority for requiring notice (of any type) in a consumer class action suit. *Mullane* involved a judicial settlement of a common trust fund in which the only notice given to beneficiaries was by publication. While the Court ordered the best notice practical it continuously emphasized the practicalities of the case and the expense of the endeavor as a limitation on any notice requirement.

Mullane is readily distinguishable from Real Parties' plaintiff consumer class action suit. *Mullane* was not a class action. The notice in *Mullane* was necessary to satisfy jurisdiction requirements (not one of the beneficiaries was before the Court and many were out-of-state residents). In *Mullane* the interests of the beneficiaries (income, principal, contingent, etc.) were adverse to one another. In contrast here the Respondent Court has found Real Parties' interest to be typical of the absent class members. More importantly, Respondent determined that Real Parties could and would adequately represent the absent class members. In *Mullane* the trust fund was available to pay for notice costs so that cost objections were not involved, *i.e.,* it was practical, whereas no such fund exists here. Those obtaining notice in *Mullane* were defendants, here it would be plaintiffs. Defendants there would be losing a right or claim; here plaintiffs would be gaining [the redress of] a right or claim. No beneficiary was before the court. No finding was made concerning adequate representation.

Indeed, in *Mullane*, the Court was concerned that those appointed to guard the absentees' interests would conduct fruitless contests in their name, dissipating trust funds and never have to report to their clients or obtain court approval of any stipulation or settlement. The *Mullane* Court itself disclaimed any interest in establishing a rigid rule, by stating at 313-14:

> "A construction of the due process clause which would place impossible or impractical obstacles in the way could not be justified."

Clearly, consumer class actions suits, where the cost of notice is enormous because of the number of persons wronged by the defendant's conduct, do not fit the *Mullane* model. The expense of notice in the typical large consumer class action, where individual stakes are small, may destroy the viability of the only means of pursuing those claims.

It cannot be said that in a case where the stakes are small, any type of notice satisfies anything except the conscience of the Court. The consumer who receives the notice and understands its contents (a rarity) is not accorded any right at all. See Miller, *Problems in Giving Notice in Class Actions* (1973) 58 FRD 313, 321-22. Certainly opting in or out cannot be said to be worth the cost of notice. Here, to allow an individual consumer to pursue his/her $200 claim will cost over $30,000. Yet this was Professor Kaplan's concern, the primary author of the 1966 Amendments. Kaplan, *Continuing Work of the Civil Commission: 1966 Amendments of the FRCP* (1967) 81 Harv.L.Rev. 356, 387. Even if opting in or out were important, notice does not realistically permit an intelligent deci-

sion. How will the absentee know if his/her interests are adequately protected at this point in the suit? Even if such a person obtained (at his/her cost) the Court file, he/she would not be able to decide if his/her interests are adequately represented. Notice does no one any good (although it is said to increase the *res judicata* affect for the defendant) and can create a great deal of no good. Can it really be said that if the plaintiff class loses on the merits those persons who opt out nonetheless can begin a suit against the same defendant for the same wrong? This result is not only unfair to defendant, but extraordinarily burdensome to the courts. Surely one's desire to prosecute a small consumer claim separate from that of the class which adequately represents him/her cannot be worth the cost of notice or the cost of subsequent separate suits. Since notice is not constitutionally required, it follows that the notice ordered by Respondent Court is legally adequate.

V.

CONCLUSION

Both *Civil Service Employees Insurance Company v. Superior Court* and *Cartt v. Superior Court* make it clear that individual notice to absent class members is not constitutionally required and that the trial court may constitutionally shift the costs of notice to the defendant. Meaningful notification has been provided by the Order of the Respondent Court herein, and all of the relevant factors have been appropriately considered and determined by said Court.

* * *

FOOTNOTES

7. Real Parties are forced to admit the literal truth of the quoted statement by Petitioner, but it is based on the lack of legal merit of Petitioner's defense, rather than any evidentiary basis.

8. Petitioner is not precluded from arguing that it is unlawfully deprived of financial information, as it subsequently argues (Petitioner's memorandum, p. 20). However, it may not simultaneously argue that it has established as a fact that it will be permanently deprived of property.

9. It is difficult to perceive how the court's failure to require bond *guaranteed* any deprivation, much less that it will be "final and permanent."

10. The only reference to bond found by Real Parties' counsel is a footnote in Petitioner's brief, claiming that "consequently, plaintiffs should be required to post an appropriate bond in the event VWOA is ordered to pay all or part of the costs of notice to protect VWOA's interest." Appendix, p. 223. However, no subsequent motion was made by Petitioner on this point.

14. Substantial press coverage in newspapers and on radio was attendant to the filing of the complaint herein.

APPENDIX "I"

PETITION FOR WRIT OF MANDATE

In the Court of Appeal of the State of California
First Appellate District
Division _____

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,
Real Parties in Interest.

No. _____
(San Francisco Superior Court No. 780024,
Hon. Stuart R. Pollak, Judge)

PETITION FOR WRIT OF MANDATE

To the Honorable Presiding Justice and to the Honorable Associate Justices of the Court of Appeal of the State of California, First Appellate District:

Petitioner Volkswagen of America, Inc., by this verified petition, respectfully applies for a writ of mandate and sets forth the following facts and causes for the issuance of a writ:

* * *

VIII

Respondent court has abused its discretion in issuing an order that will permanently deprive petitioner of property without due process of law and which will not provide adequate notice to absent class members. A petition for writ of mandate is an appropriate method to request review of an order for notice and for shifting costs of class notification to petitioner (*Civil Service Employers Ins. Co. v. Superior Court* (1978) 22 Cal. 3d, 362). Petitioner has no plain, speedy and adequate remedy in the ordinary course of law.

* * *

II. THE CLASS NOTICE ORDER PERMANENTLY DEPRIVES PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Supreme Court has explained that:

> "*** at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case" (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313).

Whether due process requirements are satisfied in a particular case involves a two-stage inquiry. First, the inquiry is whether there has been a deprivation of a protected interest (*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428). Second, the inquiry concerns the adequacy of the process provided (ibid.).

A. *The class notice order permanently deprives petitioner of its constitutionally protected property.*

Under respondent court's order, VWoA is required to expend at least $23,000 to assist real parties in providing notice to absent class members. Petitioner's property interest in these sums is entitled to no less due process than any other property interest.

> "It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we were in the past to distinguish among different types of property in applying the Due Process Clause" (*North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 608).

Although by its literal terms the class notice order only directs VWoA to "advance" 75 percent of the notice costs, the practical effect of the order is to permanently deprive VWoA of at least $23,000. VWoA has virtually no chance of recovering there costs at the conclusion of the litigation.[1]

The final and permanent nature of the deprivation here is guaranteed by respondent court's failure to require real parties to post a bond or other appropriate security for the notice costs.[2] Thus, petitioner is left without any protection against substantial financial loss even if it prevails on the merits in this case. Far less substantial and permanent deprivations have been uniformly held subject to due process constraints.[3]

B. *The deprivation does not comply with the requirements of procedural due process.*

This action is still at a preliminary stage. No orders regarding a determination of the merits have been entered or made.[4] Even the class certification order is conditional and subject to revision (*Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821). Nevertheless, petitioner is ordered to make a substantial expenditure with virtual certainty that it will never recover a penny of those funds should it prevail.

The precise nature and scope of the hearing required to satisfy due process will vary depending upon the circumstances presented (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands" (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481). At all times, however, the hearing provided must be meaningful and appropriate to the nature of the case (*Mullane v. Central Hanover Bank and Trust Co.*, supra, 339 U.S. at 313).

The competing governmental and private interests that are affected must be balanced to determine the adequacy of the hearing (*Mathews v. Eldrige* (1976) 424 U.S. 319, 334-335). The Supreme Court has identified the factors which must be considered in this balancing process:

> "These include the importance of the private interest and the length or finality of the deprivation [citations omitted], the likelihood of governmental error [citation omitted], and the magnitude of the governmental interests involved" (*Logan v. Zimmerman Brush Co.*, supra, 455 U.S. at 435).

In addition, to these specific factors the overriding purpose of due process must be considered in evaluating the constitutionality of particular procedures.

> "* * * Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken" (*Fuentes v. Shevin*, supra, 407 U.S. at 90, n. 22).

These factors demonstrate the unconstitutionality of the "process" afforded petitioner. The interest at stake here is the right of every individual to preserve and protect his property. The deprivation will be final. Even if VWoA prevails on the merits, it will be unable to recover any of the funds expended on class notice. In order to satisfy the requirements of due process a "meaningful" determination or adjudication on the merits must precede a cost-allocation decision (see *Armstrong v. Manzo* (1965) 380 U.S. 545, 552; *Pratt v. Taylor* (1981) 451 U.S. 527, 540).

Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal.3d 362, the only California case sustaining the imposition of notice costs upon a class action defendant, is not to the contrary. It was an action against an insurance company seeking damages for refusal to pay benefits under a medical expense clause. The defendant asserted that the policy did not require it to pay the benefits. Plaintiff moved for partial summary judgment on that affirmative defense. "As a practical matter this motion requested the court to resolve the principal legal issue presented by the case" (22 Cal.3d at 369). The trial court granted the plaintiff's motion for partial summary judgment, finding that the plaintiff's interpretation of the policy was correct as a matter of law.

> "[T]he partial summary judgment order, rejecting defendant's interpretation of its insurance policy, realistically assured the plaintiff class at least a partial victory in its lawsuit" (22 Cal. 3d 381).

The trial court's resolution of the summary judgment motion rendered the subsequent class notice order "in-

vulnerable" to a procedural due process challenge (ibid.).

By contrast, no merit determination has been made in this case. Constitutionally, no "hearing appropriate to the nature" of the final deprivation in this case has been held (see *Mullane v. Central Hanover Bank and Trust Co.*, supra, 334 U.S. at 313). At the very minimum, this hearing should have been conducted under the standards applied in preliminary injunction hearings. Before issuing a preliminary injunction the trial court must consider whether defendant will suffer greater injury from granting of the preliminary relief than plaintiff from its denial *and* whether there is reasonable probability that plaintiff prevail on the merits (*People v. James* (1981) 122 Cal. App. 3d 25, 39). Even when those determinations are made in plaintiff's favor, the injunction cannot issue without a bond (Code Civ. Proc., §529).

* * *

IV. *IN ADDITION, THE NOTICE ORDERED IS LEGALLY INADEQUATE.*

Respondent court ordered notice to the class by a one-time publication in 10 major and a number of smaller newspapers which should, in the aggregate, circulate in all California counties. Such notice is insufficient to satisfy the governing legal standards.

California courts have repeatedly emphasized the importance of providing absent class members with "appropriate notice of the pendency of a class action that will affect their interests" (*Home Savings and Loan Ass'n v. Superior Court* (1974) 42 Cal. App. 3d 1006, 1010; see also *Chance v. Superior Court* (1962) 58 Cal.2d 275, 290). The individual members of the class have a fundamental due process right to be ap-

prised of the pendency of a class action and afforded an opportunity to participate (*Eisen v. Carlisle & Jacquelin* (1974) 446 U.S. 156, 173-174). As the California Supreme Court has cautioned:

> "Because of the constitutional importance of notifying absent class members—who are suddenly before the court—such notice should not be left to the whim of litigants" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460).

Notice is also required to protect the integrity of the class action process (see *La Sala v. American Sav. & Loan Ass'n*, supra, 5 Cal.3d at 873).

> "The principal purpose of notice to the class is the protection of the integrity of the class action process, one of the functions of which is to prevent burdening the courts with multiple claims when one will do" (*Cartt v. Superior Court*, supra, 50 Cal. App. 3d at 970).

The importance of this interest is reflected in this Court's decision in *Kass v. Young* (1977) 67 Cal. App. 3d 100, upholding an order which vacated a default judgment entered against the defendant in a class action. This Court concluded that class certification and appropriate notice in class actions are mandatory jurisdictional requirements (id., at 105).

As a general rule, individual notice is required to class members because

> "* * * it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; whether to 'opt out' and pursue

their independent remedies" (*Cooper v. American Savings & Loan Association* (1976) 55 Cal. App. 3d 274, 285).

Potential plaintiffs "are entitled to the *best practical notice under the circumstances* * * *" (*Kass v. Young*, supra, 67 Cal. App. 3d at 106) (emphasis added). Notice by publication is permissible only where the "class membership is huge, the damages are minimal and res judicata and other problems * * * are insignificant" (*Cooper v. American Savings & Loan Ass'n*, supra, 55 Cal.App.3d at 285).

The damages claimed on behalf of class members in this action are far from minimal. According to real parties, the damages for "excessive" oil consumption alone may amount to several hundred dollars for each of the 200,000 class members. Damages claimed for engine damage may exceed $1,000 for some individuals. In addition, the real parties claim $7,500,000 in consequential damages for the class. "Where members of the class have a substantial claim, individual notice is required * * *" (ibid.).

The rationale of the decisions sanctioning the use of notice by publication is that where questions concerning the res judicata effect of the class action judgment on the parties are minimal due to the unlikelihood of renewed litigation and the small damages, individual notice may not be required because the financial burden of providing such notice outweighs its potential benefits (*Cartt v. Superior Court*, supra, 50 Cal. App. 3d at 969, 972-973; *Cooper v. American Savings & Loan Association*, supra, 55 Cal. App. 3d at 284-285). Conversely, where there is a real prospect of multiple litigation over the class action claims, individual notice is "essential" to protect the interests of absent class members and the court (see *Cooper v. American Savings & Loan Association*, supra, 55 Cal. App. 3d at 285-286). In every case, the court's objective in determining the appropriate type of notice to be given is to ensure that practical res judicata will be achieved between the parties through the class action. The court must attempt to

"settle the dispute between the class and the defendant for all practical, as distinguished from theoretical purposes [to ensure] that the entire class' complaint is adjudicated de facto, if not de jure" (*Cartt v. Superior Court*, supra, 50 Cal. App. 3d at 968).

Thirty actions have been filed against VWoA facially raising claims encompassed within real parties' complaint (App., pp. 284, 294-297). Some of these actions were filed after the initiation of the instant case. There is both a present reality of multiple litigation and a concrete prospect of future litigation involving the class action claims. Under the circumstances, individual notice should be required to protect the interests of absent class members whose rights will be adjudicated in this action and to preserve the integrity of the class action process. The class notice ordered by the respondent court neither protects the due process rights of class members nor preserves the integrity of the class action process.

* * *

FOOTNOTES

1. The absence of any realistic possibility of reimbursement for ostensibly "interim" cost-shifting orders in class actions has alarmed courts and commentators (see, e.g., *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 975; *Eisen v. Carlisle & Jacquelin* (1973) 479 F.2d 1005, 1009 at n. 5 1013, 1020 (Hays, J., concurring) (2d Cir.), affirmed (1974) 417 U.S. 156; *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132; McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues* (1974) 25 Hast. L. Jour. 1351, 1398-1399); Recent Developments, *Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs in Class Action Rejected* (1973) 73 Col.L.Rev. 1641, 1653-1655; Note, *Allocation of Identification Costs in Class Actions, Sanders v. Levy* (1978) 91 Harv. L. Rev. 703, 711

at n. 60; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. W.L. Rev. 65, 80-81).

2. The absence of any guarantee of reimbursement sharply differentiates this case from other circumstances in which a defendant may be required to spend funds on behalf of the plaintiffs during the initial stages of litigation. In those instances, the plaintiff is generally required to provide security to protect the defendant against loss. For example, a bond must be posted to obtain a preliminary injunction (*Elliott v. Osborne* (1851) 1 Cal. 396, 397; Code Civ. Proc., §529) and similar undertakings are required in certain professional malpractice and out-of-state plaintiff cases (Code Civ. Proc., §§1029.5; 1029.6; 1030. Similarly, the expenses of reference of water matters to a board—perhaps the only taxable litigation cost comparable in potential size to class notification expense—must be adequately provided for by the parties, subject to court approval, whenever a board believes that "the payment of the expense of any reference is not reasonably certain" (Water Code §2042).

3. In a series of decisions beginning in 1969, the courts invalidated a number of statutory provisions which failed to afford individuals these basic procedural safeguards required by due process (*Snaidach v. Family Finance Corp.* (1969) 395 U.S. 337; *Macallop v. Carberry* (1970) 1 Cal. 3d 903 (wage garnishment); *Fuentes v. Shevin* (1972) 407 U.S. 67 (replevin of household goods); *North Georgia Finishing Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601 (prejudgment attachment of property securing a commercial deed); *Blair v. Pitchess* (1971) 5 Cal. 3d 258 (claim and delivery); *Randone v. Appellate Dept.* (1971) 5 Cal. 3d 536 (prejudgment attachment of checking accounts)).

4. In fact, such determinations are probably not yet permissible. Class issues must be resolved "prior to any determination of the merits of the action" (*People v. Pacific Land Research Co.* (1977) 20 Cal. 3d 10, 16; *Home Savings & Loan Ass'n v. Superior Court* (1976) 54 Cal. App. 3d 208, 211; *Home Savings & Loan Ass'n v. Superior Court* (1975) 42 Cal. App. 3d 1006, 1015).

APPENDIX "J"

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR AN ORDER REGARDING NOTICE TO CLASS AND ALLOCATION OF COST OF NOTICE

In The Superior Court of the State of California
In and for the City and County of San Francisco

JOAN NOSSE, JERRY KANE, et al.,
Plaintiffs,

vs.

VOLKSWAGEN OF AMERICA, INC., et al.,
Defendants.

NO. 780024
Date: May 6, 1983
Time: 9:30 A.M.
Dept: Law and Motion

I. INTRODUCTION AND SUMMARY OF ARGUMENT

* * *

Defendant argues that the constitution requires both individual notice to absent class members and that the cost of such notice be borne by plaintiffs. Defendant's leading authority for it's position, indeed, the first two cases it relies on, are federal cases, *Eisen v. Carlisle & Jacquetin* (1974) 417 U.S. 156 (*Eisen IV)* and *Oppenheimer Fund, Inc. et al. v. Sanders* (1978) 437 U.S. 340. Defendant appears to

virtually ignore the California Supreme Court's decision in *Civil Service Employees Inc. Co. v. Superior Court* (1978) 22 Cal. 3d 362 (hereinafter "*Civil Service*") and the Court of Appeals language in *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960 (hereinafter *Cartt*). Both these cases and other California authority make it clear that individual notice to absent class members is not constitutionally required and that the trial court may constitutionally shift the cost of notice to the defendant.

II. *DEFENDANT'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY SHIFTING THE COST OF NOTICE TO DEFENDANT.*

Defendant argues that cost shifting violates its due process rights citing *Eisen IV,* and *Oppenheimer Fund, Inc. v. Sanders, supra,* 437 U.S. 340. Defendant suggests that a well reasoned decision of the California Supreme Court ought to be rejected by this Court because it was a 4-3 decision. Considering the present membership of the California Supreme Court, the *Civil Service* decision would appear to be stronger now then when it was written in 1978. At any rate, and regardless of the present make of the California Supreme Court, even the law firm of Pillsbury, Madison & Sutro is bound by 4-3 California Supreme Court decisions.[1]

In *Civil Service,* the California Supreme Court addressed the very issue which defendant raises. Part two of the *Civil Service* opinion states the issue and the answer in one concise sentence:

> "(2) The trial court did not violate defendant's due process rights in ordering it to bear the initial cost of noti-

fying the plaintiff class of the pendency of the action." *Civil Service,* at 374.

The Supreme Court in *Civil Service,* literally addressed itself to the very cases which defendant now relies upon.

"Contrary to the present defendant's assertion, however, nothing in *Eisen IV* suggests that any absolute constitutional barrier obstructs such a preliminary cost-shifting order. Indeed, the Supreme Court's most recent class action decision, *Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340 [57 L.Ed.2d 253, 98 S.Ct. 2380] makes it clear that even under the federal rule a federal district court, in appropriate circumstances, is empowered to require a defendant to bear some of the expense entailed in identifying and notifying absent class members. Thus, the relevant federal authorities go no further than to hold that, under the present provisions of federal rule 23, a plaintiff in a federal class action is normally required to bear the "burden of financing his own suit."

In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the cost of notice upon either the plaintiff or the defendant. Civil Code section 1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class action the court may direct *either party* to notify each member of the class of the action." (Italics added.)

A class action procedure authorizing a trial court to impose notice costs upon a defendant in a particular case serves the same general public policies. In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may

> often be unable to afford the initial cost of notifying all absent members of the pendency of the action. (See Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin* (1973) 87 Harv.L.Rev. 426, 441-442; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. Western L. Rev. 65, 83.) Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the strength of the plaintiff's claim." *Civil Service,* at 375-378.

In light of the *Civil Service* decision, defendant's due process argument is without merit.

III. *COST OF NOTICE SHOULD BE SHIFTED TO DEFENDANT IN THIS CASE.*

A. *Public policy combined with the merits of plaintiffs' cause require that costs of notice be shifted to defendant.*

As Pls. Memo re Costs indicates, both the California Courts and the California Legislature are strongly committed to promoting the consumer class action devise as a means of providing consumers with an efficient and economical mechanism to secure their rights. It is obvious that a defendant should not be able to defeat a consumer class action by inflicting a small amount of damages on a great number of people and then hide behind the fact that representative plaintiffs with small claims won't expend large sums on notice to absent plaintiffs who also have small claims. To not shift the cost is to encourage mistreatment of consumers by large corporations. See *Civil Service,* at 377-378; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800; Consumer Legal Remedies Act, Civil Code §1760.

Plaintiffs are not relying solely on the stated expressed public policy of California. Rather plaintiffs have demonstrated that their cause is meritorious and on that basis the costs of notice should be shifted to defendant.

Plaintiffs requested that this Court take judicial notice of the FTC Complaint, Exhibit D to Pls. Memo re Costs which determined that defendant's acts were unfair, deceptive, and prejudicial to the public, causing the public injury in violation of the Federal Trade Commission Act.

Defendant's response is, at the very best disingenous. First defendant states that the Complaint is hearsay and not evidence. This Court was, and still is, asked to take judicial notice of Exhibit D and if it does so, it then is evidence. As Evidence Code §454 states, the exclusionary rules of evidence (including hearsay) do not apply to a determination as to whether or not to take judicial notice.

Next defendant disputes the fact that the EPA's Notice and Order which is Exhibit E to Pls. Memo re Costs, dealt with valve stem seals or excessive oil burning. This is *chuzpah* taken too far. Defendant does not and cannot dispute the most illuminating factor in terms of the merits of plaintiffs cause: defendant terminated EPA involvement with a limited Recall Program which offers to replace (or reimburse if already replaced) defective valve stem seals on 1977-1979 gasoline engine Rabbits and Sciroccos.[2]

Defendant literally does not even mention this singularly important point.

Further, Defendant does not dispute that since the faulty part's composition was changed, replacement figures indicate that the problem, excessive oil consumption and related loss has ceased to exist.[3]

B. *Defendant should pay for costs of notice because it is the defendant that seeks the security of res judicata not the plaintiffs.*

Defendant admits that the average plaintiff's claim in this case is $130.00. Defendant asserts that this sum, $130.00 is so significant that this Court, should fear multiple litigation. It is the courts that defendant wishes to protect, so implies the defendant. (Defendant's Memo, p. 21-22). Defendant backs up its argument with the feable assertion that "There are several actions currently pending" which encompass claims made by plaintiffs, some even filed after plaintiffs' filed suit. (Defendant's Memo, p. 22) No number of claims or complaints are supplied. No amount of damages is stated. No description of the encompassing claims is indicated. Indeed no declaration or affidavit or any evidence at all is offered in support of this statement. All we have here is defendant's attorney's bald statement, nothing more.

Yet defendant argues that notice, indeed individual notice is required. Defendant obviously seeks to halt this lawsuit by requiring plaintiffs to pay for individual, expensive notice. At the same time defendant seeks to protect itself by the subsequent use of *res judicata.*

The Court in *Cartt,* at 971-972, distinguished between those cases where plaintiffs' individual claims are significant so that renewed litigation after a class

judgmnet is an important concern and those where the plaintiffs' claim are insignificant (here $130.00, the example given in *Cartt* was $100), where it is unlikely and only a remote possibility that an absent class member would renew litigation; hence individual notice would be unnecessary.

Further, Rule 23(c) of the Federal Rules of Civil Procedure (FRCP) does not require notice of all class actions. Those rules are promulgated by the United States Supreme Court and then enacted by Congress. (28 U.S.C. §2072-2073 and FRCP 86 as amended.) The notion that *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306 requires that notice be sent to each class member is undermined by the fact that Rule 23 was amended, promulgated and enacted in 1966, fully 16 years after the *Mullane* decision. That rule indicates that no notice whatever is required for Rule 23(b)1 and (b)2 type class actions.

Moreover, the Court in *Cartt*, at 677-678, distinguished both *Mullane v. Central Hanover Bank & Trust Co., supra*, and *Eisen IV* by stressing that the former did not deal with class actions, (absent, unnamed class members) where costs were substantial compared to the benefits to be gained by each individual class member, and the latter by indicating that the case simply dealt with the specific language of FRCP 23(c), not with the Constitution. In short nothing in the Constitution requires individual notice in this action.

The notice methods suggested by plaintiffs will give defendant the assurance it seeks and shifting the cost of such notice to defendant will not permit defendant (and others like it) to defeat the salutory purposes of the consumer class action procedure.[4]

IV. *PUBLICATION AND/OR INDIVIDUAL FIRST CLASS MAIL NOTICE WILL SERVE THE INTEREST OF DEFENDANT.*

Plaintiffs' have in Pls. Memo re Costs suggested a combination of publication notice in 7 major California Newspapers in five major California cities as well as individual first class or otherwise, mailed notice to present owners of the subject vehicles as a means of satisfying defendant's desire for the subsequent use of *res judicata* should it win this lawsuit.

Nothing prevents defendant from utilizing its own Vehicle Data File or its own records of past recalls of the subject vehicles to assist it in this desire. Defendant recalled close to 500,000 Rabbits and Sciroccos in 1979 because of water leaking through the antenna socket which caused the engines of those vehicles to start at will, a safety defect. NHTSA monitors safety defect recalls and defendant to maintain records of this and other such recall campaigns.

It is odd that defendant places reliance in its brief on the California Court of Appeals case of *Cartt.* Defendant's present councel represented Real Party in Interest, Standard Oil Company of California. In that case, as here, the plaintiffs sought small sums in damages, which, given the large numbers of class members they represented added to substantial money damages which were allegedly inflicted by Standard. The trial court ordered individual mailed notices to 700,000 persons. Plaintiffs were ordered to pay the $70,000 in notice costs. Plaintiff's sought and obtained a peremptory writ directing the trial court to issue orders consistant with the views expressed in *Cartt. Cartt* held that the consumer class action devise was the precise mechanism created for such suits, and

that considering the insignificant amount of individual damages each claimant sought (*Cartt*, at 971-972, cited *Darr v. Yellow Cab Co., supra*, 67 Cal.2d 695, 702, 703 which spoke of plaintiff's $100.00 claim, here, in our suit, defendant speaks of plaitniffs' average $130.00 claims), and the little or remote likelihood of renewed litigation, that publication *not* individual notice was appropriate. The *Cartt* court suggested shifting the cost of such notice to defendant might be appropriate but since that issue was not before it, it was not decided until the California Supreme Court did so, three years later in *Civil Service.*

In short, plaintiffs have suggested a variety of ways in which defendant can protect itself and the California Courts have sanctioned these and other methods. Other methods exist. For example magazine advertising, radio and television advertising and others with which the defendant, who is more than familiar with recall programs and notice to its injured customers, is fully aware.

* * *

FOOTNOTES

1. Defendants not only ask this Court to disregard the majority opinion and embrace the minority decision in *Civil Service,* but, so convinced of its rightiousness, defendant quotes the dissent in *Civil Service* as if it were Justice Kaus' quote in *Cartt* (Memorandum of Points & Authorities In Response To Plaintiff's Motion For An Order Regarding Notice To Class And Allocation Of Cost Of Notice, p. 16, 11.14-26, hereinafter cited as "Defendant's Memo")

2. See plaintiffs' Memorandum of Points and Authorities in Support of plaintiffs' Motion for Certification of Class, pp. 12-15 and accompanying footnotes.

3. *Id.* p. 14, fn. 33.

4. This Court's Class Action Manual permits an action to proceed without any notice at all. See, Class Action Manual, §427.6.

APPENDIX "K"

MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PLAINTIFFS' MOTION FOR AN ORDER REGARDING NOTICE TO CLASS AND ALLOCATION OF COST OF NOTICE

In the Superior Court of the State of California,
in and for the City and County of San Francisco

JOAN NOSSE, et al., Individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendants.

No. 780024
Date: May 6, 1983
Time: 9:30 A.M.
Dept.: Law and Motion

I. *INTRODUCTION AND SUMMARY OF ARGUMENT.*

* * *

[Plaintiffs] suggest that:

> "[i]f no notification were given and plaintiffs win, then the absentees can take advantage of the judgment; if no notification were given and plaintiffs lose then the absentees are not bound" (ibid.).

Plaintiffs seek to pursue a "class action" in which a victory for them will bind the defendant with respect to the entire class but in which a defense verdict will bind only four of possibly 200,000 class members.

This position utterly misconceives the nature and purpose of a class action. Notice is indispensable both to protect the due process rights of absent class members and to safeguard the vital interest of the courts in avoiding a plethora of individual lawsuits. It is because of the importance of these interests that the courts consistently rule that notice must be provided to the class.

As a general rule plaintiffs are required to pay for their expenses in initiating and maintaining a lawsuit. This rule extends to plaintiffs acting as representatives of a class in a class action (*Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 178-197). Upon commencing a class action suit, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members and paying the costs of providing them with notice of the action (*Oppenheimer Fund, Inc. et al v. Sanders* (1978), 437 U.S. 340, 356-359; *In Re Nissan Motor Corp. Antitrust Litigation* (5 Cir. 1977) 552 F.2d 1088, 1102).

Plaintiffs seek an exception from this general rule, relying upon *Civil Service Employers Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362. However, *Civil Service* does not authorize unrestricted imposition of notice costs upon defendants in class actions. At most, the decision permits trial courts to exercise discretion, in light of the relevant factors, in deciding whether those costs should be shifted to the defendant. Those factors in the present case demonstrate that the Court should decline to shift costs.

The Court must determine the appropriate means of notifying the class. Plaintiffs are certified to repre-

sent the class and have an obligation to insure that legally adequate notice is provided to the absent class members in the most effective manner. Yet both the method and content of notice which plaintiffs propose fail to satisfy the governing legal standards. The Court should reject plaintiffs' proposals and adopt those of the defendant to insure that legally adequate notice is provided.

II. *NOTICE MUST BE PROVIDED TO THE ABSENT CLASS MEMBERS.*

Plaintiffs argue that absent class members need no notice and that notice will only benefit the defendant (Pls. Memo., p. 7). This ignores the true purposes of class notice which include protecting the interests of the absent class members and of this Court.

Plaintiffs have assumed a fiduciary obligation to the members of the class and must protect the rights of all class members (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871). Each of the named plaintiffs has acknowleged his/her special responsibilities as a class representative (Declarations In Support of Plaintiffs' Motion For Certification of Class of Joan Nosse (par. 11), of Gwen Wong (par. 11), of Jerry Kane (par. 10), of Tao Fang and Catherine Fang (par. 11), and Cliff Hoffman (par. 10) (attached as Plaintiffs Exhs. K-O to Plaintiffs' Motion for Class Certification)). Plaintiffs' counsel has also assured the Court:

> "The class representatives are protecting not only their individual interests, but also the interests of the other class members. * * * I have advised the class members of their fiduciary obligations regarding the

class, and as is evident from their declarations submitted as supporting documents to this motion, they understand the nature and gravity of this undertaking and their special responsibilities" (Decl. of William Weiner in Support of Plaintiffs' Motion for Class Certification, par. 8).

The individual members of the class have a fundamental due process right to be apprised of the pendency of this action and afforded an opportunity to participate (*Mullane v. Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306). "The essentials of due process of law in class suits would appear to be afforded by fair representation in the assertion of claims of class members against the opposing parties in any lawsuit and *notice of the pending suit*" (*Chance v. Superior Court* (1962) 58 Cal.2d 275, 290 (emphasis added, citations omitted)). The court of appeals has emphasized the right of absent class members to notice in rejecting an approach to notice like that suggested by plaintiffs here:

"[O]nce the composition of the class is determined, its members are entitled to appropriate notice of the pendency of a class action that will affect their interests. Notice is particularly requisite when those purporting to represent the class seek payment of substantial compensation from all class members in the event of success. After the members of the class have been properly notified of the action, they are required to decide whether to remain members of the class represented by the plaintiffs' counsel and become bound by a favorable or unfavorable judgment in the action, whether to intervene in the action through counsel of their own choosing, or whether to 'opt out' of the action and pursue their own independent remedies, such as a negotiation with defendants, initiation of their own action or intervention in some other action" (*Home Savings and Loan Ass'n v. Superior Court* (1974) 42 Cal. App. 3d 1006, 1010)[1]; ac-

cord: *Lamb v. United Security Life Co.* (S.D. Iowa 1972) 59 F.R.D. 25, 40).

To protect the rights of absent class members, the trial court must insure that prompt and effective notice is provided. As the California Supreme Court has noted:

> "Because of the constitutional importance of notifying absent class members—who are suddenly before the court—such notice should not be left to the whim of litigants" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460).

Providing notice to the absent class is also required to serve the interest of the court in preserving the integrity of the class action process (see *La Sala v. American Sav. & Loan Assn.,* supra, 5 Cal.3d at 873). As Justice Kaus observed, in an opinion heavily relied upon by plaintiffs:

> "The principal purpose of notice to the class is the protection of the integrity of the class action process, one of the functions of which is to prevent burdening the courts with multiple claims when one will do" (*Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 970).

The importance of this interest is uniformly reflected in the leading decisions. For example, in *Kass v. Young* (1977) 67 Cal.App.3d 100, the court of appeals upheld the order of this Court vacating a default judgment entered against the defendant in a class action on the ground that no class had been certified and that no notice had been given to the alleged class. The court of appeals concluded that class certification and notice in class actions are mandatory jurisdictional requirements. As the court explained:

"The strong language about the necessity of these procedures and the careful explanations of the reasons for the necessity appearing not only in *Home Savings & Association* but also in *City of San Jose v. Superior Court*, 12 Cal.3d 447; *Vasquez v. Superior Court*, 4 Cal.3d 800, 820, 821; *Blue Chip Stamps v. Superior Court*, 18 Cal.3d 385, 386, are persuasive of the jurisdictional nature of prejudgment adjudication of the certifiability of the class as a class action, determination of the composition, and appropriate notification" (id., p. 105).

In sum, notice to the absent class members is required both to protect their rights and to preserve the integrity of the class action process.[2] Plaintiffs, by initiating a class action and obtaining class certification, have assumed the burden of complying with the procedural requirements of a class action, including notice. In arguing that the class is not entitled to notice, plaintiffs cast doubt upon their ability to adequately represent the interests of the absent class members in this action.

* * *

B. *Shifting Notice Costs to VWoA Would Violate Its Due Process Rights.*

The rights of absent class members can only be protected by proper and effective notice. Under the Fifth and Fourteenth Amendments to the Constitution of the United States plaintiffs' fiduciary responsibility to give and pay for such notice cannot be shifted to defendant prior to a determination on the merits. There is no discretion to force a defendant to bear plaintiffs' obligation to provide notice to the class. The arguments on both sides of the due process

question are marshalled in the majority and dissenting opinion in *Civil Service Employees Ins. Co. v. Superior Court*, (1978), 22 Cal.3d 362. In that case, a four justice majority, over a strong dissent by three members of the court, allowed a trial court to shift notice costs estimated at up to $20,000 to a defendant following partial summary judgment for plaintiffs. In the view of the majority, the issues finally adjudicated by such summary judgment "realistically assured the plaintiff class at least a partial victory in its lawsuit" (id. at 384). The bulk of both opinions is devoted to discussion of the majority view that even a preliminary hearing, as opposed to a final judgment, could provide a sufficient Constitutional basis to compel a defendant to bear the cost of class notice in an action against it. We think the dissenting opinion is the correct constitutional and statutory analysis. That is, ordering a defendant to advance notice costs for a lawsuit against it before adjudication of its liability violates defendant's right to due process of law. Civil Code Sec. 1781(d) should be read to authorize cost shifting only where there has been a determination pursuant to section 1781(c) that there is no defense to the action (id., 382-387).

Judge Kaus' counsel in *Cartt v. Superior Court*, supra, is that:

> "As far as shifting the cost burden of giving notice to the defendant is concerned, probably the less we say about this problem at this time, the better.
>
> *** [T]he concept of making a defendant pay thousands of dollars so that a suit against it may proceed raises obvious constitutional problems, which should not be decided until they must be" (id. at 975.)

As the dissent in *Civil Service* stated:

"Requiring plaintiffs in class actions to pay notice costs does not place an unreasonable limitation upon meritorious causes of action. The traditional method of financing class litigation involving minor claims of many plaintiffs-like the method of financing plaintiff costs in personal injury litigation-is for counsel to advance the costs. If counsel does not have sufficient confidence in his cause to advance costs, he should not burden our courts with questionable claims of clients who have not retained him" (*Civil Service,* supra, 22 Cal. 3d at 386).

IV. *PLAINTIFFS' PROPOSED METHOD OF DISSEMINATING THE CLASS NOTICE IS INADEQUATE AND FAILS TO SATISFY THE GOVERNING LEGAL STANDARDS.*

* * *

In their class certification motion plaintiffs argued that the class is "readily identifiable" through official records, including those maintained by VWoA (Memo. of Points and Authorities in Support of Plaintiffs' Motion for Class Certification, p. 28). But plaintiffs apparently subsequently recognized the virtually impossible task of ascertaining the members of their class and their whereabouts. Indeed, the plaintiffs' decision to rely upon a mailing list of *current* vehicle owners represents an acknowledgment that the members of the certified class cannot be identified.

The Affidavit of John Von Hollen, Product Recall Coordinator for VWoA, clarifies the extent of this problem. VWoA does not maintain any records or data base from which members of the class can be identified (Affidavit of John Von Hollen, par. 3, attached hereto as Exhibit B). The only relevant source of such information possessed by VWoA is its computerized Vehicle Data File, which is indexed by Vehicle Identification Numbers (id., par. 4). The file is maintained for use in sending out recall notices.

Because such notices are sent to current rather than former owners, information on the names and addresses of prior vehicle owners is not retained in the file (id., par. 4). As soon as name and/or address change information is received by VWoA regarding the owner of a particular vehicle it is substituted in place of the existing information (id., par. 5). VWoA processes 10,000 such changes per month (ibid.).

Under the circumstances, there is no means of determining whether the individuals listed in VWoA's Vehicle Data File are class members, except in cases where the original purchaser is the current owner of the vehicle and has not moved. The class simply cannot be identified from these records. The court should consider, therefore, whether decertification or redefinition of the class is appropriate. At a minimum, the class should be redefined to limit its scope to identifiable members. If plaintiffs are unable or unwilling to undertake the process of framing a class with identifiable members, the Court should decertify this action.

Plaintiffs' proposal for publication by newspaper is equally deficient. In the first place, publication is inherently inappropriate in an action such as this where plaintiffs may be divested of their right to pursue individual damage claims, which whether meritorious or not, may be substantial. In any case, the one-day publication of a quarter-page ad in newspapers in five California cities (Pls. Memo at 9) suggested by plaintiffs fulfills neither the guiding statutory requirements nor the purpose of notice.

As a general rule, individual notice is required to class members because "it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; whether to "opt out" and pursue their independent remedies" (*Cooper v. American Savings &*

Loan Association (1976) 55 Cal.App.3d 274, 285). Potential plaintiffs "are entitled to the *best practical notice under the circumstances* ***" (*Kass v. Young,* supra, 67 Cal. App. 3d at 106 (emphasis added)). Notice by publication is permissible only where the "membership class is huge, the damages are minimal and res judicata and other problems *** are insignificant" (*Cooper v. American Savings & Loan Ass'n,* supra, 55 Cal.App.3d at 285).

Here the damages claimed by the class members are not minimal. Plaintiffs have claimed damages for oil consumption alone totaling $18,750,000 (Pls. Memo. at 18). They estimate additional consequential damages of at least $7,500,000 (id. at 20). If there are 200,000 class members (Pls.Memo. at 3) their claims average $130. This is not an insignificant sum and individual class members can be expected to assert claims in excess of $130 (e.g., Joan Nosse $1,200).

The rationale of the decisions sanctioning the use of notice by publication is that where questions concerning the res judicata effect of the class action on the parties are minimal, due to the unlikelihood of renewed litigation, individual notice should not be required because the financial burden of providing such notice outweighs its potential benefits (*Cartt v. Superior Court,* supra, 50 Cal. App. 3d at 969, 972-973; *Cooper v. American Sav. & Loan Ass'n,* supra, 55 Cal. App. 3d at 284-285). Conversely, where there is a real prospect of multiple litigation over the class action claims, individual notice is "essential" to protect the interests of absent class members and the Court (see *Cooper v. American Sav. & Loan Ass'n,* supra, 55 Cal.App.3d at 285-286). In every case, the court's objective in determining the appropriate type of notice to be given is to insure that practical res judicata will be achieved between the parties through the class action. The court must attempt to "settle the dispute between the class and the defendant for all practical, as distinguished from theoretical purposes [to insure] that the entire class' complaint is adjudicated de

facto, if not de jure" (*Cartt v. Superior Court*, supra, 50 Cal.App.3d at 968).

There are several actions currently pending against VWoA in which class members are raising claims encompassed within plaintiffs' complaint. (Further Response of VWoA to Plaintiffs' First And Second Set of Interrogatories, Response to Interrogatory No. 54 and Exh. A hereto). Some of these actions were filed after the initiation of the instant case. Obviously there exists sufficient incentive for class members to initiate individual actions. There is both a present reality of multiple litigation and a concrete prospect of future litigation over the class action claims. Under the circumstances, individual notice should be required.

* * *

V. *THE CONTENT OF PLAINTIFFS' PROPOSED NOTICE IS INADEQUATE.*

* * *

The proposed notice also fails to state that the Court has made no determination on the merits of plaintiffs' claims. The strict appearance of judicial impartiality in the notice is essential (*Newberg*, supra, §2475(e), pp. 150-151). Yet plaintiffs' proposed notice contains the statement that the

> "*** notice has been approved as to form and content by order of the Superior Court of the State of California, in and for the City and County of San Francisco."

This statement of judicial approval in a document bearing the Court's signature may suggest, to the unsophisticated layman, that the Court views the plaintiffs' position favorably. The statement serves no purpose in the notice. It should be eliminated.

The Court should state that the class action certification order does not constitute a determination of the merits of plaintiffs' claims. It is only a preliminary procedural determination as to the potential parties involved. The Court should also state that the notice is not to be understood as an expression of any opinion by the Court as to the merits of any claims or defenses asserted by either side. The inclusion of these statements will preserve the appearance of judicial impartiality.

* * *

FOOTNOTES

1. The requirement of notice also insures that the defendant will be fairly treated:

> "[T]he vice of the procedure followed by the trial court is that it allows so-called 'one-way intervention,' a procedure under which potential members of the class can reserve their decision to become part of the class until the validity of the cause is asserted by the main plaintiffs on behalf of the class has been determined. While one-way intervention has obvious attraction for members of the class on whose behalf an action has been brought in that it creates for them a no-lose situation, for defendant it holds the terrors of an open-ended lawsuit that cannot be defeated, cannot be settled, and cannot be adjudicated. To him it presents a classic no-win option" (id., p. 1011).

2. Plaintiffs' statement that this Court's Class Action Manual "indicates that notice *** of the pendency of all class actions is not required" is somewhat misleading (Pls. Memo., p. 7). The Manual provides that as a "general rule" notice "shall be ordered" (Class Action Manual, §427.6). However, "an order may be made, on *motion* of a party,

dispensing with the *requirement* that the class be notified of the action" (ibid.) (emphasis added). By its express terms, section 427.6 of the Manual makes class notice mandatory unless a party, upon a properly noticed motion, persuades the Court that the notice requirement should be waived in a particular case. In view of the constitutional considerations involved, a party would have an extremely heavy burden to meet in order to obtain a waiver of the notice requirement (see *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 315; *Hansberry v. Lee* (1940) 311 U.S. 32).

AFFIDAVIT OF JOHN VON HOLLEN

In the Superior Court of the State of California
In and for the City and County of San Francisco

JOAN NOSSE, JERRY KANE, et al.,

Plaintiffs,

-against-

VOLKSWAGEN OF AMERICA, INC., et al.,

Defendant.

STATE OF NEW JERSEY)
:ss.:
COUNTY OF BERGEN)

JOHN VON HOLLEN, being duly sworn, deposes and says:

1. I am Product Recall Coordinator, for defendant Volkswagen of America, Inc. ("VWoA"). I make this affidavit, based on personal knowledge, in support of VWoA's submission in response to plaintiffs proposals concerning notification to the class.

2. I am informed that the Court has defined the class to be notified as all persons residing in California who, at any time between May 7, 1976 and May 1, 1979, owned a 1974-1980 Volkswagen manufactured Rabbit, Dasher, Scirocco or Audi equipped with valve stem seal No. 056-109-675, who have registered such vehicle with the California Department of Motor Vehicles.

3. I know of no listing or data base maintained by VWoA or any other entity, from which the identities of all, or even a substantial portion of such persons can be identified and located. Conversely, every data base known to me which might include some persons within the class includes numerous persons who are not within the class. The facts upon which I base these statements are as follows:

4. VWoA maintains no records of original retail purchasers as such. Our computerized Vehicle Data File is indexed by Vehicle Identification Numbers (VIN) which can be sorted by model and year. That listing, however, only identifies the most recent registered owners of each vehicle known to VWoA, as this file exists, not for historical purposes but as a source of current data for use in recall or service actions.

5. When VWoA receives notification of name and address changes, the former data is automatically deleted from the file. Such name and/or address changes are presently being processed by VWoA and entered in the file at the rate of 10,000 per month. No distinction is made between mere address changes and changes of ownership. Accordingly, the number of original vehicle owners who can be identified as such through the Vehicle Data file decreases over time.

6. A particular vehicle file will show whether any changes of name and/or address have been entered as to that vehicle. However, the file will not show how many such changes have occurred, nor will it reflect their nature.

7. The Vehicle Data file identifies the selling dealers of particular vehicles and also shows the existence and location of the most recent used car transaction involving the vehicle which takes place through a VW or Audi dealer. The names of the parties to such transactions, however, can only be ascertained from a hand search of the records of the dealers involved, assuming that such records are retained by the dealers.

8. Accordingly, the only class members who can be positively identified from VWoA's Vehicle Data File are current California owners as to whom there has been no name or address change since May 7, 1979.

9. Based upon California's market share for VW's and Audi's and the extraordinarily high mobility of the state population, I believe it a fair estimate that 20% of the name and address changes received by VWoA relate to California. On this basis, I would estimate that between 90,000 and 100,000 such changes have been entered in VWoA's files as to California vehicles since the close of the class period. Since there are only approximately 150,000 vehicles in the class, a significant portion of current California owners of class vehicles are most likely not members of the class.

10. I have spoken with representatives of the Polk organization, which maintains and sells mailing lists of vehicle owners, and the California Department of Motor Vehicles. The only records available from these entities merely list current vehicle owners and are thus far less comprehensive even than VWoA's records discussed above. Such lists are not available

for periods earlier than 1980, again after the class period ended.

s/John Von Hollen
JOHN VON HOLLEN

Sworn to
April 20th, 1983

s/David Taylor
Notary Public

APPENDIX "L"

MEMORANDUM

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JOAN NOSSE, JERRY KANE, et al.,

Plaintiffs,

vs.

VOLKSAGEN OF AMERICA, INC., et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER REGARDING NOTICE TO CLASS AND ALLOCATION OF COST OF NOTICE

* * *

II

INDIVIDUAL FIRST CLASS MAIL NOTICE AND PUBLICATION IN MAJOR NEWSPAPERS WILL SERVE THE INTEREST OF VWoA

There are, of course, several salutary purposes served by an action proceeding on a class-wide basis.

One such benefit is to the plaintiff class. For instance, in this suit plaintiffs represent approximately 200,000 persons who fit the description of the class as certified by this Court.[8] The claims of each of those 200,000 people will rarely exceed $1,000.[9] Individual actions by each of the consumers plaintiffs represent would be impractical because the amount of individual recovery would not justify the bringing of a lawsuit; hence, without the use of the class action mechanism the plaintiff class, in this action, would go without redress and the defendant would keep the fruits of its fraud, breaches of contract and/or statutory duties. *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 808, 94 Cal. Rptr. 796; *Fletcher v. Security Pacific Bank* (1974) 23 Cal. 3d 442, 53 Cal. Rptr. 28.

Another benefit of the class action suit is to the courts and the defendant. Once a binding class judgment is entered other plaintiffs with similar grievances will not be able to burden the already congested courts with similar claims nor will such persons be able to succeed in suing the defendant on the same claims as those determined in the class action. *Cartt v. Superior Court* (1975) 50 Cal. App. 3d 960, 124 Cal. Rptr. 376.

In its order certifying this case as a class action, this Court resolved in favor of plaintiffs the issue of

whether the named plaintiffs and their counsel could properly represent the unnamed class members described in this Court's Certification Order. Thus, the primary purpose of the notice to the members of the class, at this stage of the proceedings, is to assure defendant that any judgment in its favor will be *res judicata* on all class members. *Cartt v Superior Court, supra,* 50 Cal App. 3d at 968-969; *Cooper v. American Savings and Loan Association* (1976) 55 Cal. App. 3d 274; 127 Cal. Rptr. 570. As the court succinctly stated in *Home Savings and Loan Association v. Superior Court* (1974) 42 Cal. App. 3d 1006, 1007, 117 Cal. Rptr. 485:

> The critical reason for notification of members of the class on whose behalf a class action has been brought is that notification makes possible a binding adjudication and an enforceable judgment with respect to the rights of the members of the class. Absent such notification no member of the class need be bound by the result of the litigation. Defendant, however, could find itself in an entirely different position. Under the doctrine of collateral estoppel a defendant who litigates and loses issues tendered in a class action filed by an individual member of the class may be estopped in subsequent litigation with other members of the class to deny the validity and binding effect of the judgment against him in the first action. Contrariwise, if defendant prevails in the first cause of action involving merely individual members of the class, no other members of the class need be bound by the outcome, for they were not parties to the lawsuit and received no notification about it.

It is clear that, unlike the federal forum and Federal Rule of Civil Procedure 23, California law does not require individual notice to members of the class. *Archibald v. Cinerama Hotels* (1976) 15 Cal. 3d 853,

861, 126 Cal. Rptr. 811; *Cartt v. Superior Court, supra,* 50 Cal. App. 3d at 975. Indeed, the San Francisco Superior Court Manual for the Conduct of Pretrial Proceedings in Class Actions (1977, August; hereinafter referred to as "the Manual") indicates that notice, let alone individual notice, of the pendency of all class actions is not required (Manual, §427.6).

Nonetheless, it is also clear that defendant VWoA may well wish that each and every class member receive notice and choose not to "opt out" so that a judgment favorable to it, after what is already an extensive litigation process, will be binding on all future plaintiffs with similar claims. *Home Savings and Loan Association v. Superior Court, supra,* 42 Cal. App. 3d at 1011.

The named plaintiffs, already having been found to be adequate representatives of the class, can and will proceed with the prosecution of this case with the interests of the absent class members as their primary concern. The same plaintiffs feel no particular need to notify the absent class members at this point in the proceeding. If no notification were given and plaintiffs win, then the absentees can take advantage of the judgment; if no notification were given and plaintiffs lose, then the absentees are not bound. *Notification only helps the defendant.*

Just so the plaintiffs' position is not misconstrued, plaintiffs upon settlement and/or a favorable judgment would strenuously urge that each and every member of the plaintiff class be notified in the best possible manner so that plaintiffs' hard fight for results would truly inure to the largest number of class members. But now, at this stage of the litiga-

tion, it is primarily defendant that benefits from notice to class members because of the potential *res judicata* effect of notification and non-exclusion (not opting out).

The defendant who, as alleged herein, victimizes hundreds of thousands of people is not entitled to only one lawsuit. On the other hand, the integrity of the class action process demands that the court assure itself that renewed litigation is only a remote possibility. In addressing this very problem, the court in *Cartt v. Superior Court, supra,* 50 Cal. App. 3d at 968-969, held publication notice may be sufficient rather than individual notice (Justice Kaus, now of the California Supreme Court, wrote the opinion):

> It simply does not follow, however, that a state may not permit a class action to go forward unless the defendant can be assured in advance that in the event of a defense victory all members of the class will be foreclosed from further proceedings. A defendant who in one way or another victimizes hundreds of thousands has, after all, no constitutional rights to be subjected to only one lawsuit. This is not to say that the integrity of class action process does not demand that it settle the dispute between the class and the defendant for all practical, as distinguished from theoretical, purposes: that the entire class' complaint is adjudicated *de facto,* if not *de jure* . . . .
>
> The best that the class action court can do is to give itself reasonable assurance that under all of the circumstances that may prevail in the future—the improbability that anyone else who is only minimally damaged will undertake and underwrite new litigation, the statute of limitations, the doctrine of *res judicata* and, above all, the impact of *stare decisis*—renewed harassment is nothing but a remote

theoretical possibility. (Emphasis in original) (footnotes omitted).

The Manual §427.6(b)(11) requires that a statement discussing the manner of notice be set forth in this motion. Likewise, the Consumer Legal Remedies Act, Civil Code §§1750, *et seq.*, (applicable here, see *infra*, parts III and IV), suggests at §§1781(c) and (d) a similar statement by the parties.

Plaintiffs believe that individual notice and publication in major newspapers throughout the state will best give defendant VWoA the protection it may require. Plaintiffs have determined that mailed individual notices (including obtaining the list of class members, typesetting, printing letters and envelopes, folding letters, labelling, delivery to post office, postage and sales tax) for approximately 200,000 class members will cost an estimated $51,243.08. (Footnote omitted). Publication of ¼ page ads in the main section of major newspapers for one day costs (footnote omitted):

Newspaper	*Circulation*	*Cost*
San Jose Mercury	230,000	$1,498.98
Oakland Tribune	185,000	890.48
S.F. Chronicle & Examiner	660,000	4,770.00
Los Angeles Times	1,081,050	5,760.00
Los Angeles Herald Examiner	307,000	1,876.00
San Diego Union Tribune	345,000	2,028.00

The method here suggested and recommended by plaintiffs will give defendant reasonable assurance of a binding judgment upon all persons with similar grievances who do not opt out. Defendant, of course,

may suggest and recommend other or different notice mechanisms more suited to its desires. As Justice Kaus stated in *Cartt v. Superior Court, supra,* 50 Cal. App. 3d at 974:

> This, of course, would not prevent Standard from stuffing at its own expense if it desires to do so. If Standard is sincerely troubled about the *res judicata* effect of this litigation, it should be permitted to buy as much protection against future claimants as it thinks it needs. (Footnotes omitted).

III.

DEFENDANT SHOULD BE ORDERED TO PAY FOR THE COST OF NOTIFICATION TO CLASS MEMBERS

The California Supreme Court has affirmed the Superior Court of the City and County of San Francisco's order directing the defendant, in a class action suit, to initially bear the expense of the cost of notice. *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, 149 Cal. Rptr. 360 (hereinafter *"Civil Service"*).

The Supreme Court in *Civil Service* contrasted California's procedure with that of the federal courts, and held at 22 Cal. 3d 376:

> In California, in contrast to the federal realm, the Legislature has specifically authorized trial courts in class actions to impose the cost of notice upon either the plaintiff or the defendant. Civil Code section 1781, subdivision (d), a provision of the Consumer Legal Remedies Act enacted in 1970 to facilitate consumer class actions, explicitly provides that "[i]f the action is permitted as a class action, the court may direct *either* party to notify each member of the class of the action." (Emphasis added.)

Although section 1781, subdivision (d), does not directly apply to the present case because insurance is technically neither a "good" nor a "service" within the meaning of the Act [Civ. Code §1761, subds. (a) and (b)], we expressly held in *Vasquez v. Superior Court, supra,* 4 Cal. 3d 800, 820, that the class action procedures prescribed by the Consumer Legal Remedies Act could and should appropriately be utilized by trial courts in all class actions. Numerous decisions since *Vasquez* have confirmed the applicability of the Act's procedures in class actions which do not strictly fall within the aegis of the act. (See, *e.g., Anthony v. General Motors Corp.* (1973) 33 Cal. App. 3d 640, fn. 1, 651, 109 Cal. Rptr. 240). Moreover, in enumerating the various provisions of the Consumer Legal Remedies Act by which trial courts should be guided, we specifically identified in *Vasquez,* section 1781, subdivision (d) and its authorization of the imposition of notice costs on either party in a class action. (4 Cal. 3d at p. 820). Thus, under *Vasquez,* California trial courts clearly possess general authority to impose notice costs on either party, plaintiff or defendant, in a class action. (Footnotes omitted).

The *Civil Service* Court reiterated what it said in *Vasquez,* section 1781, subdivision (d), and its authorization of the imposition of notice costs on ty. The Court then stated at 22 Cal. 3d 377-378:

A class action procedure authorizing a trial court to impose notice costs upon a defendant in a particular case serves the same general public policies. In the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying all absent members of the pendency of the action. (See

> Note, *Managing the Large Class Action; Eisen v. Carlisle & Jacquelin* (1973) 87 Harv. L. Rev. 427, 441-442; Comment, *Cost Allocation in California Class Actions* (1976) 13 Cal. Western L. Rev. 65, 83.) Under such circumstances, a defendant who may have improperly inflicted a small financial loss upon a great number of people could succeed in defeating a class action suit without regard to the strength of the plaintiffs' claim.

Indeed, §1760 of the Consumer Legal Remedies Act codifies the legislative intent and philosophy toward consumer class actions. Civil Code section 1760 states:

> This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

In *Cartt v. Superior Court, supra,* 50 Cal. App. 3d 960, 970, Justice Kaus recognized that "the notice ordered must be consistent with the broad California concept of consumer class actions," as stated in *Vasquez v. Superior Court, supra,* 4 Cal. 3d 800, 808. After pointing out the extremely favorable treatment the Supreme Court has given to consumer class actions, the *Cartt* court stated at 50 Cal. App. 3d 971, 972:

> More specifically, our cases have indicated that class actions should be permitted to proceed, where the economic realities involved in giving "adequate" notice, compared to the small individual losses of class members, would effectively negate any class action. Thus, in *Daar v. Yellow Cab Co., supra,* 67 Cal. 2d 695, which involved an unknown number of Los Angeles taxi cab users, the court, in distinguishing between an

"ascertainable class and the necessity of identifying the individual members of such class" noted that a "finding of a community of interest at this time *may provoke later questions as to the res judicata effect of any judgment herein.* However, as Witkin says '[A] distinction is sometimes drawn between the maintenance of suit and its binding effect on the absent parties. A sufficient pleading of the conditions may withstand a demurrer and satisfy the court that the action should proceed. *But if the judgment is thereafter collaterally attacked by an absent party, a more careful scrutiny of its representative character may be made in determining whether it is res judicata.*' " *(Id.,* at p. 706. Fn. and citation omitted; emphasis added).

Daar was not concerned with notice; the issue was the propriety of a class action. However, in allowing the action to go forward, *Daar* necessarily recognized that there was no economically feasible method of assuring that all class members would receive notice of the action. *Daar* would, doubtless, not have been maintained as an individual action; even the named plaintiff alleged only $100 spent in script book coupons and cash *(Id.,* at pp. 702, 703) and the claim was only for overcharges! (Emphasis in original).

The *Cartt* Court distinguished between those cases where the plaintiffs' individual claims are significant so that renewed litigation after a class judgment is an important concern and those where the plaintiffs' claims are insignificant in amount, a few hundred dollars (the average claim in the present suit), where it is unlikely and only a remote possibility that an absent class member would renew litigation; hence, individual notice would be unnecessary.

The court in *Cooper v. American Sav. & Loan Assn.* (1976) 55 Cal. App. 3d 274, 127 Cal. Rptr. 579, following *Cartt* and other California law, stated at 284-285:

> In *Chance, supra,* the amounts involved were substantial and the class action was opposed by some potential class members. The required notice was by registered mail or other like reliable method. In *City of San Jose, supra,* the plaintiffs sought damages of $500,000 for a class estimated at 733. The court noted the constitutional importance of notifying absent class members because of the desirability that any judgment be *res judicata.*
>
> In contrast to the above cases, *Daar v. Yellow Cab Co., supra,* 67 Cal. 2d 695, though not involved with a notice issue, proceeded as a class action suit although there was no feasible method of assuring that all class members would receive notice. The reason was that individual members probably would not have maintained individual actions because each member's damages were so low. Questions as to the *res judicata* effect on the parties was minimal if not nonexistent. *Cartt,* in comparing *Chance, et al.* with *Daar,* said on pages 972-973: "The distinction with respect to the concern for the *res judicata* effect of the action in *Chance* and in *Daar* is notable . . . Unlike in *Daar,* the class members in *Chance* were much less likely to abandon their claims, and, absent personal notice to assure that the matter would be *res judicata* as to the remaining class members, any advantages in the class action mechanism would be negated by the likelihood that the issue would surface again." *Cartt* then concluded: "This case is obviously way over on the *Daar* side of the spectrum. Therefore, it is entirely appropriate—as the Supreme Court suggests—to distinguish 'between the maintenance of the suit and its binding effect on the absent parties.' (67 Cal. 2d at p. 706). The class is

> huge, the damages per member trifling and the financial burden of the notice ordered by the respondent court entirely out of proportion to its beneficial results when these are compared to the purely theoretical risks of a less expensive method of notifying the class."

In this consumer class action suit plaintiffs' class of 200,000 is large and plaintiffs' class members' individual claims are small . . . as to financial inability of plaintiffs to defray noticed costs (Material ordered stricken from the record). The very reason for this class action is to vindicate small claims which would otherwise go without redress. Such claimants, by definition, would not themselves due for redres but rely on the class action mechanism. Hence, this Court should not be concerned with multiple litigation. If the defendant is concerned with the *res judicata* effect on this litigation, then defendant should pay for the cost of such assurance.

The Supreme Court in *Civil Service, supra,* 22 Cal. 3d at 380, indicated that the trial court at the notice hearing is to consider factors mentioned in *Cartt,* which case in turn considered the factors mentioned in *Berland v. March* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132, and *Lamb v. United Security Life Company* (S.D. Iowa 1972) 59 F.R.D. 25, 38-43, in determining who should bear the initial cost of notification.

The *Cartt* court's main consideration was the likelihood of renewed litigation. In this case it is clear that renewed litigation is not a concern; it doesn't even approach a remote possibility.

Cartt also mentioned that the Federal Trade Commission (hereinafter "FTC") had issued, after in-

vestigation, a cease and desist order and that the trial court resolved several issues in favor of the plaintiff, including that (1) the class was ascertainable; (2) there were questions of law and fact common to the class members; (3) the class action was superior to other available alternatives; and (4) the plaintiff was an adequate representative for the class.

In this case, the FTC has issued a complaint against VWoA based upon allegations similar to those alleged by plaintiffs herein, wherein the Commission has determined, after investigation, that the FTC has "reason to believe" that VWoA has violated the Federal Trade Commission Act, 15 U.S.C. §45. Such a complaint must be based upon a threshold determination that proceedings should be initiated requiring VWoA to respond and litigate the issues therein involved. *F.T.C. v. Standard Oil of California* (1980) 101 S. Ct. 488. Further, VWoA attempted to have certain charges dismissed by filing a motion for summary judgment in docket number 9154, before the FTC. This Court is hereby requested to take judicial notice of the FTC complaint against VWoA and the denial of VWoA's motion for summary judgment, pursuant to the Cal. Evid. Code §450, *et seq.;* a copy of information sufficient to substantiate plaintiffs' request (the FTC complaint and the Order Denying VWoA's Motion for Summary Judgment) is attached as group Exhibit D to this motion and incorporated herein by reference.

Further, and perhaps more importantly, the Environmental Protection Agency (hereinafter "EPA") has in October 1980, issued a Notice of Non-Conformity Finding and Order re Remedial Plan indicating that a substantial number of VWoA Vehicles (same makes and models involved in this class action

lawsuit) were, because of excessive oil burning due to valve stem seal defects, polluting in excess of federal standards. See, 42 U.S.C. 7541(d), which is also known as §207(c) of the Clean Air Act, 40 C.F.R. 85.1802. This Court is hereby requested to take judicial notice of the E.P.A. Notice and Order re Remedial Plan pursuant to Cal. Evid. Code §450, *et seq.;* a copy of information sufficient to substantiate this request is attached as Exhibit E to this motion and incorporated herein by reference.

Most illuminating in terms of the merits of plaintiffs' cause is the fact that defendant VWoA has terminated EPA involvement (in light of recent events, that appears to be easy to do) by instituting an extremely limited recall of only 1977-1979 gasoline engine Rabbits and Sciroccos, merely offering to replace the defective valve stem seals and, in some cases, to reimburse the owners no more than $125.00 if defective seals had already been replaced at the owner's expense (footnote omitted).

It should be emphasiz;ed, however, that VWoA's limited recall does not provide for reimbursement for loss of oil, damage caused by oil leakage, or repairs made in vain efforts to halt oil seepage. Further, no provision is made for reimbursement to those owners who replaced defective valve stem seals with other defective valve stem seals. Nor does the limited recall account for all vehicles equipped with defective valve stem seals: 1974, 1975, 1976 and 1980 Rabbit, Scirocco, Audi and Dasher vehicles, 1977, 1978 and 1979 Dasher and Audi vehicles, and 1974-1980 diesel engine vehicles are all omitted.

A further indication of the merits of plaintiffs' class claims is the fact that ever since new and different valve stem seals were used in April 1979 production, replacement figures indicate that the problem, excessive oil consumption and related loss, has ceased to exist (footnote omitted).

Defendant has virtually admitted liability by implementing a limited national recall and changing the composition of the offending valve stem seals. The EPA and the FTC both issued notices, complaints and orders concerning the subject of this lawsuit. The public policy and philosophy indicated by the California Supreme Court and the Consumer Legal Remedies Act will best be served by shifting the initial cost of notice to the defendant. As the Supreme Court in *Civil Service* stated at 22 Cal. 3d 377:

> . . . in the absence of such a cost shifting procedure, the class action mechanism might frequently be completely frustrated since the representative plaintiff, whose individual claim will ordinarily be relatively small, may often be unable to afford the initial cost of notifying absent members of the pendency of the action.

Therefore, without costs allocated initially to the defendant, plaintiffs herein, and in general, would be foreclosed from obtaining any meaningful remedy.

> When an action cannot proceed unless costs are allocated, where merits are unquestionably strong, and where vindication would be effectively foreclosed absent the class action procedure, strong public policy considerations clamor for justice. (Comment, *Cost Allocation in California Class Actions, supra,* 13 Cal. Western L. Rev. 65, 85).

* * *

APPENDIX "M"
STATE CLASS ACTION PROVISIONS

Alabama:	Ala. Code, R. Civ. P. 23 (c)(2)
Alaska:	Alaska Rules of Court, Civil Rule 23(c)(2)
Arizona:	Ariz. Rev. Stat. Ann., R. Civ. P. 23(c)(2)
Arkansas:	Ark. Stat. Ann., R. Civ. P. 23(d)
California:	Cal. Civil Code §1781(d) (West)
Colorado:	Colo. Rev. Stat., R. Civ. P. 23 (c)(2)
Connecticut:	Conn. Gen. Stat. Ann. §42-110 h(d) (West)
Delaware:	Del. Code Ann., Chancery Ct. R. 23(c)(2)
District of Columbia:	D.C. Court Rules Ann., Rule 23(c)(2)
Florida:	Fla. Stat. Ann., R. Civ. P. 1.220(d)(2) (West Supp. 1983)
Georgia:	Ga. Code Ann. 9-11-23
Guam:	Guam Code Civ. Pro., App. A Rule 23(c)(2)
Hawaii:	Hawaii R. Civ. P. 23(c)(2)
Idaho:	Idaho Code, Court Rules 23(c)(2)
Illinois:	Ill. Ann. Stat., ch. 110 §2-803 (Smith-Hurd)
Indiana:	Ind. Code Ann., Court Rules T.R. 23(c)(2) (Burns)
Iowa:	Iowa R. Civ. P. Ann., Rule 42.7 (West Supp. 1983)
Kansas:	Kan. Stat. Ann., R. Civ. P. §60-223(c)(2)
Kentucky:	Ky. Rev. Stat. Ann., R. Civ. P. C.R. 23.03(2) (Baldwin)
Louisiana:	La. Code Civ. Pro. Ann. Art. 594 (West)
Maine:	Me. Rev. Stat. Ann., R. Civ. P. 23(c)(2)
Maryland:	Md. Ann. Code, R. Civ. P. 209(c)
Massachusetts:	Mass. Ann. Laws, Civ. R. 23 (Michie/Law. Co-op)
Michigan:	Mich. Ct. R. Ann. 208
Minnesota:	Minn. Stat. Ann., R. Civ. P. 23.03(2) (West)

Missouri:	Mo. Ann. Stat., R. Civ. P. 52.08(c)(2) (Vernon)
Montana:	Mont. Rev. Codes Ann., R. Civ. P. 23(c)(2)
Nebraska:	Neb. Rev. Stat. §25-319
Nevada:	Nev. Rev. Stat., R. Civ. P. 23(c)(2)
New Jersey:	Rules Governing the Courts of the State of New Jersey, Civ. P.R. 4:32-2(b)
New Mexico:	N.M. Stat. Ann., R. Civ. P. 23(c)(2)
New York:	N.Y. C.P.L.R. §904(b)(McKinney)
N. Carolina:	N.C. Gen. Stat. §1A-1, Rule 23
N. Dakota:	N.D. Cent. Code, R. Civ. P. 23(g) (Smith Supp. 1981)
Ohio:	Ohio Rev. Code Ann., R. Civ. P. 23(c)(2) (Page)
Oklahoma:	Okla. Court Rules and Procedure, 12 §15
Oregon:	Or. Rev. Stat, R. Civ. P. 32
Pennsylvania:	42 Pa. Cons. Stat. Ann., R. Civ. P. 1712 (Purdon)
Puerto Rico:	P.R. Laws Ann., T. 23 App. II, R. Civ. P. 20.1
Rhode Island:	R.I. Gen. Laws, R. Civ. P. 23(d)
S. Carolina:	S.C. Code §15-5-50
S. Dakota:	S.D. Comp. Laws Ann. R. Civ. P. 23(c)(2)
Tennessee:	Tenn. Code Ann., R. Civ. P. 23(c)(2)
Texas:	Tex. R. Civ. P. 42(c)(2) (Vernon)
Utah:	Utah Code Ann., R. Civ. P. 23(c)(2)
Vermont:	Vt. Stat. Ann., R. Civ.P. 23(c)(2)
Virgin Is.:	V.I. Code Ann., T.5 App. I Civil R. 23(c)(2)
Washington:	Wash. Ct. R. Ann., C.R.23(c)(2)
W. Virginia:	W. Va. Code Ann., R. Civ. P. 23
Wisconsin:	Wis. Stat. Ann. §803.08 (West)
Wyoming:	Wyo. Ct. R. Ann., R. Civ. P. 23(c)(2)

Office - Supreme Court, U.S.
FILED
AUG 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1814

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO
(JOAN NOSSE, et al., Real Parties in Interest)
Respondents.

On Appeal From The Supreme Court of California

MOTION TO DISMISS APPEAL

(Or In The Alternative To Affirm The Judgment Of The California Court of Appeal)

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No. 83-1814

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

VOLKSWAGEN OF AMERICA, INC.,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO
(JOAN NOSSE, et al., Real Parties in Interest)
Respondents.

On Appeal From The Supreme Court of California
MOTION TO DISMISS APPEAL
(Or In The Alternative To Affirm The Judgment Of The California Court of Appeal)

INTRODUCTION

Petitioner framed two "Questions Presented" in its Jurisdictional Statement:

> (1) Does California Civil Code Section 1781(d) [the provision of the California Consumer Legal Remedies Act setting forth the basis on which a California trial court may order notice in connection with the maintenance of a class action] violate the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States when applied to require notice of the pendency of a class action by

publication only, even to members of a class of plaintiffs whose names and addresses can be ascertained with reasonable effort? and

(2) Does the same California Civil Code section violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States when applied to require a defendant opposing the class to pay substantial costs of notice to the class prior to any determination of liability and without hope of reimbursement if defendant prevails or if class certification is limited or rescinded?

Neither question is properly raised in the litigation which petitioner seeks to bring before this Court. Indeed, the artful manner in which both questions have been phrased by Petitioner misrepresents the true state of the record below and misconstrues significant provisions of the state statutory scheme upon which the trial court founded its order for notice to the class. When the record is properly set forth and the state statutory scheme properly described, the Petitioner's proffered claim of constitutional deprivation disappears.

Respondents move this Court to dismiss this appeal and/or deny a writ of certiorari for the following reasons:

On the first question, no justiciable federal issue is presented:

(a) Factually, the issue is manufactured, because the record fails to indicate that the names and addresses of absent class members can be ascertained with reasonable effort.

(b) The issue is premature since the California trial court has issued no order that binds or purports to bind any absent class member and may never do so in the future;

(c) The issue is premature since under the California statutory scheme, as interpreted by California courts, the notice ordered by the trial court does not as a matter of course require that any subsequent trial court orders or judgments will have *res judicata* effect over absent class members; and

(d) Petitioner lacks standing to assert any purported violation of due process rights on behalf of absent class members whom it does not represent and to whom its interests are avowedly hostile.

On the second question, Petitioner's claim that it has been permanently deprived of its property is not supported by the record, and no substantial federal question is presented by the trial court's order apportioning the *initial* cost of notice:

(a) (1) Petitioner's claim of permanent deprivation of property is not supported by the record since California law provides that cost of notice is recoverable should Petitioner prevail; (2) there is absolutely no evidence in the record that Respondents would be unable to satisfy a cost judgment in the amount of notice costs advanced by Petitioner; and (3) Petitioner cannot complain of a permanent deprivation when Petitioner failed to affirmatively seek an order requiring Respondents to post security;

(b) The trial court's order requiring Petitioner to advance a portion of the cost of notice to absent class members pendente lite presents no substantial federal question since (1) the order was entered after two noticed hearings at which Petitioner had full opportunity to present any evidence and argument it wished; and (2) Petitioner failed at these hearings to avail itself of a statutory opportunity for additional hearings; and

(c) The trial court's order apportioning the initial cost of notice presents no substantial federal question since Petitioner received more than due process required before being temporarily deprived of its property.

For the above stated reasons, Petitioner's appeal should be dismissed pursuant to Rule 16 of this Court.

ARGUMENT

I

THE TRIAL COURT'S NOTICE ORDER PRESENTS NO JUSTICIABLE FEDERAL ISSUE TO THIS COURT CONCERNING THE SUFFICIENCY OF NOTICE TO ABSENT CLASS MEMBERS

A. The Record Does Not Support Petitioner's Assertion That The Names And Addresses Of A Substantial Number Of Class Members Are Readily Ascertainable

Petitioner claims that notice to absent class members by publication here is constitutionally inadequate for the "50,000 or more class members who are identifiable through reasonable effort." The portion of the record cited by Petitioner does not support its assertion that the names

and addresses of *any* actual class members are reasonably ascertainable:

> I know of no listing or database maintained by [Petitioner] VWoA or any other entity, from which the identities of all, or even a substantial portion of such persons can be identified and located. Conversely, every database known to me which might include some person within the class includes numerous persons who are not within the class.

Affidavit of John von Hollen, retail coordinator for Petitioner, paragraph 3. (Petitioner's Jurisdictional Statement p. 82a)

The trial court's order provides for notice to be published in a quarter-page display announcement in at least one general circulation newspaper in every county in the State of California. The newspapers carrying the notice have a combined circulation in excess of 2.8 million readers. The trial court's order requires publication in the two major newspapers in the Los Angeles metropolitan area and the four largest newspapers in the San Francisco Bay Area, the two largest population centers in the state. (See Appendix A, Declaration of Samuel A. Krantz)

In light of the von Hollen affidavit, the record is devoid of any evidence of better means of notice, and Petitioner did not provide the trial court with any.

From Petitioner's Jurisdictional Statement, it is not clear that Petitioner can segregate the names of any potential class member from its database. It is unclear whether Petitioner proposes a mailing to every person in the database (at Respondents' expense) on the hypothetical assumption that some of the names may turn out to be class members. The only evidence that Petitioner's database now con-

tains the names of *any* ascertainable class members is the conjecture of Mr. von Hollen that there may still be original purchasers of the cars who have not changed addresses since purchase. (von Hollen affidavit, ¶ 9, at p.83a.)

If Petitioner desired the trial court to entertain notice by mail, it was required to present evidence that the names and addresses of class members were reasonably ascertainable. It did not, and its belated suggestion now should not be heard for the first time by this Court. The Court should decline to consider the merits of an issue not presented by the record with sufficient clarity to enable a decision. *Gilbert v. State of California,* 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967); *Mishkin v. State of New York,* 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966).

Petitioner's appeal/petition for certiorari should be dismissed.

B. The Question Of Adequate Notice Under Due Process Standards Is Premature

At this stage, absent class members have received no notice at all. Neither has the California trial court issued any order purporting to bind any absent class member, or affect in any way the rights of any absent class member. Consideration of the due process rights of absent class members at this juncture in the proceedings is premature and contradicts criteria established by this Court for taking a case under review.

Further, no absent class member may ever be affected in the future by any trial court order. Under California law, the trial court may at any juncture decertify the class. *Occidental Land, Inc. v. Superior Court (Fahnestock, Real Party),* 18 Cal.3d 355, 134 Cal.Rptr. 388, 556 P.2d 750

(1976). Such decertification would remove subject matter jurisdiction over the claims of absent class members against Petitioner. Alternatively, the trial court could at some future point dismiss the class action without affecting the rights of absent class members in any fashion. *Marcarelli v. Cabell,* 58 Cal.App.3d 51, 129 Cal.Rptr. 509 (1976); *La Sala v. American Savings & Loan Association,* 5 Cal.3d 864, 97 Cal.Rptr. 849, 489 P.2d 1113 (1971).

Therefore, consideration of due process rights of absent class members at this juncture is entirely theoretical, no due process rights having yet arisen and their future existance being purely speculative. Determination of the constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *International Longshoremen's & Warehousemen's Union v. Boyd,* 347 U.S. 222, 98 L.Ed. 650, 74 S.Ct. 447 (1954). The Court should decline to entertain issues on appeal or through writ of certiorari where those issues represent only a hypothetical situation and not an actual controversy grounded in real, historical events.

Petitioner's appeal/petition for certiorari should be dismissed as premature.

C. The Question of Adequate Notice Under Due Process Standards Is Premature Since Under California Law Notice By Publication To Absent Class Members Does Not Necessarily Establish Jurisdiction Over Those Members Of The Class Who Could Be Reached By More Direct Forms Of Notice

Petitioner in its Jurisdictional Statement singles out one passage from the lengthy California Consumer Legal Remedies Act and one order from the California Superior Court,

and artfully counterbalances these against this Court's holdings in *Mullane v. Central Hanover Bank,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140 (1974) ("Eisen IV") to suggest a gross violation of the due process rights of absent class members. Upon adequate review of the entire California statutory scheme and a less selective culling from the record, it becomes apparent that no substantial federal question is presented and that no question of notice is presently ripe for adjudication.

The stated purposes of the California Consumer Legal Remedies Act (California Civil Code §§ 1750-1784)

> are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

(California Civil Code § 1760.)

The Legislature specifically provided a class action mechanism under the Act to enable those persons whose individual claims were not large enough to justify separate litigation but which were representative of the claims of a large number of consumers to have a forum available to litigate the dispute. *Vasquez v. Superior Court,* 4 Cal.3d 800, 817, 94 Cal.Rptr. 796, 484 P.2d 964 (1971). The legislature selected the class action device as an effective and economical method for policing the consumer market place.

The legislature also provided that, for the class action device to be effective, California courts be given the flexibility to ensure that a class action could be maintained to resolve a consumer dispute for practical purposes, even though the final judgment would not be binding on all class members for theoretical purposes. Hence, the Consumer

Legal Remedies Act does not make the trial court's ability to issue a judgment binding on all absent class members a precondition to maintenance of a class action. *Cartt v. Superior Court,* 50 Cal.App.3d 960, 968-969, 124 Cal.Rptr. 376, 381-382 (1975).

In this respect, class actions brought under the California Consumer Legal Remedies Act differ substantially from those brought in federal courts under F.R.C.P. Rule 23. This Court's statement in *Eisen IV*:

> [I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement *of Rule 23.* As the Advisory Committee's note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind *all* class members who did not request exclusion from the suit.

Eisen v. Carlisle & Jacquelin, 417 U.S. at 177, 40 L.Ed.2d at 748 (emphasis added), should be compared with the California judiciary's explication of the notice requirements of the California Consumer Legal Remedies Act:

> [W]e can readily accept, for the sake of argument, that *Eisen IV* defines, as a matter of constitutional law, the type of notice that is required to insure that the result of the class action is binding on all members. It simply does not follow, however, that a state may not permit a class action to go forward unless defendant can be assured in advance that in the event of a defense victory all members of the class will be foreclosed from further proceedings. A defendant who in one way or another victimizes hundreds of thousands, has, after all, no constitutional right to be subjected to only one lawsuit. This is not to say that the integrity of class action process does not demand that it settle the dis-

> pute for all practical purposes: that the entire class' complaint is adjudicated *de facto,* if not *de jure.* The class action plaintiff cannot be permitted to use the process of the superior court to pursue a justice court action masquerading as a consumer class suit. Just how this goal of practical res judicata shall be furthered is, however, not a matter of federal constitutional concern as such: rather, it is the business of the state which furnishes the forum for the class action.

Cartt v. Superior Court, 50 Cal.App.3d at 968. *See also York v. Texas,* 137 U.S. 15, 34 L.Ed. 604, 11 S.Ct. 9 (1890).

California law distinguishes between an "ascertainable class" and the necessity of identifying the individual members of such class:

> A finding of a community of interest this time may provoke later questions as to the res judicata effect of any judgment herein. However, as Witkin says: "[A] distinction is sometimes drawn between the maintenance of the suit and its binding effect on the absent parties. A sufficient pleading of the conditions may withstand a demurrer and satisfy the court that the action should proceed. But if the judgment is thereafter collaterally attacked by an absent party, a more careful scrutiny of its representative character may be made in determining whether it is res judicata."

Daar v. Yellow Cab, 67 Cal.2d 695, 706, 63 Cal.Rptr. 724, 732, 433 P.2d 732 (1967).

Eisen IV established a rule for notice to absent class members as required by F.R.C.P. Rule 23. While Rule 23 requires that a maintainable class is one where all absent class members will be bound by the judgment of the court and sets a standard for notice to insure that outcome, there is no federal constitutional requirement that a state class action, to be maintained, must attempt to bind *all* absent

class members. Rather, this Court has stated that the Fourteenth Amendment does not compel states to adopt federal rules for establishing the conclusiveness of judgments in class suit. *Hansberry v. Lee,* 311 U.S. 32, 42, 85 L.Ed. 22, 27, 61 S.Ct. 115 (1940).

Here, the California trial court's notice order does not purport to establish *in personam* jurisdiction over all persons in the named class. To the contrary, the order is designed to promote effectively the purposes of the Consumer Remedies Act that the litigation may be resolved for practical purposes, economically and efficiently. Since the order does not purport to bind absent class members for whom more direct notice might be provided, Petitioner's claim that the order violates due process standards for notice required to affect the rights of absent class members is illusory, rendering the issue presented hypothetical and premature.

The Petitioner's appeal/petition for writ should be dismissed.

D. Petitioner Lacks Standing To Assert Due Process Rights Of Absent Class Members Whom It Does Not And Cannot Represent

Although Petitioner complains that the trial court's order does not give adequate notice to absent class members, Petitioner is neither an absent class member itself nor an adequate representative of absent class members. Petitioner therefore has no standing to complain about the adequacy of the notice order.

A federal court cannot pronounce any state statute void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual

controversies. *Baker v. Carr,* 369 U.S. 186, 204, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). It is incumbent upon the Petitioner to allege such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation of issues upon which the court so largely depends for illumination.

A defendant in a class action does not have a personal stake in the adjudication as to whether notice to absent members of the plaintiff class is consistent with due process. *Zablocki v. Redhail,* 434 U.S. 374, 380 n. 6, 54 L.Ed.2d 618, 627 n. 6, 98 S.Ct. 673 (1978).

Nevertheless, Petitioner claims that the due process rights of absent class members are violated by the notice order, citing *Schroeder v. City of New York* 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962) and *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950). Both cases cited by petitioner were brought by or on behalf of the parties to whom the notice was directed. Whatever the ultimate interest of absent class members may be in the type of notice afforded them should the trial court eventually issue an order attempting to bind them or affect their rights in some way, none of those absent class members are petitioning this Court now.

Petitioner asserts that it has opposed the class, and there is no question that its interests are hostile to the interests of any absent class member. Under these circumstances, Petitioner hardly has such a personal stake in the controversy that it can be an effective advocate for the rights of those to whose interests it is opposed. Under established principles of federal jurisdiction, petitioner lacks standing to assert the rights of absent members of the class.

II

PETITIONER'S CLAIM THAT NOTICE COSTS HAVE BEEN APPORTIONED IN VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS HAS NOT BEEN PROPERLY PRESERVED AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The Record Does Not Support Petitioner's Claim Of Permanent Deprivation Of Its Property Since The Cost Of Notice To Be Advanced By Petitioner Is Recoverable, The Record Is Devoid Of Evidence That Respondents Could Not Satisfy Such A Judgment For Costs, And Petitioner Failed To Affirmatively Seek Security For Its Advancement Of Costs

The cost of notice ordered by the California trial court is a recoverable cost under California Code of Civil Procedure § 1032.8. *Civil Service Employees Insurance Company v. Superior Court,* 22 Cal.3d 362, 378, 149 Cal.Rptr. 360, 584 P.2d 497 (1978). Hence, should Petitioner prevail, Petitioner may recover its share of the cost of notice to the class as a cost of suit. A cost judgment is as enforceable as any other court judgment. California Code of Civil Procedure §§ 680.150, 685.040, 685.090.

The record contains no evidence that Respondents could not satisfy such a judgment. Respondents are not indigent. They have each been able to purchase one of Petitioner's automobiles costing in excess of $4,000.00. Petitioner's claim that among the six named plaintiffs in the action Petitioner would not be able to recoup the money it will advance for notice costs is speculative at best.

Respondents did state to the trial court that, given the size of their individual claims, they were unable to pay the full cost of notice. This is only understandable, and is a common situation in those consumer class actions where the

class is large and the average individual claim modest. However, it does not flow from Respondent's cash-flow inability to advance the cost of notice that Petitioner's portion of the notice cost will be uncollectable, and the record is devoid of any evidence from which such a conclusion could be drawn.

If Petitioner had been genuinely concerned that Respondents will not be able to satisfy a judgment for costs, Petitioner could have moved the trial court for an order requiring Respondents to post security as a condition for apportioning the cost of notice. That it failed to do so does not now confer jurisdiction on this Court to rectify a tactical error on Petitioner's part below.[1]

Therefore, the record presented to this Court does not support Petitioner's assertion that the initial apportionment of cost of notice is a permanent deprivation of its property. At this point, there will be no more than a temporary deprivation.

B. The Trial Court Held Two Noticed Hearings Where Petitioner Was Able To Present Any Evidence And Argument To The Court Prior To The Court's Issuing Its Notice Order And The Consumer Legal Remedies Act Provides The Opportunity For Additional Hearings Of Which Petitioner Did Not Avail Itself

California Civil Code Section 1781(c) sets forth the criteria which must be met for an action to be maintained

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[1]During lower court proceedings Petitioner raised merely the possibility that the court could require Plaintiffs to post a bond, and Petitioner did so only once, in a footnote on page 14 of its Memorandum of Points and Authorities in Response to Plaintiffs' Motion for an Order Regarding Notice to Class and Allocation of Cost of Notice. See Appendix B, p. A-11.

as a class action under the California Consumer Legal Remedies Act. That section provides in pertinent part:

> (c) If notice of the time and place of the hearing is served upon the other parties at least ten (10) days prior thereto, the Court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:
>
> (1) A class action pursuant to subdivision (b) is proper.
>
> (2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.
>
> (3) The action is without merit or there is no defense to the action.

The statute specifically provides Petitioner with the opportunity to demonstrate that this action is without merit. Such a motion, akin to a motion for summary judgment, may be brought by a defendant to rid itself of a class action even before notice is provided to absent class members. While judgment dismissing the action would not bind the unnoticed members of the class, California procedure (in contrast to F.R.C.P. Rule 23 procedure) recognizes that offering such a practical end to the class litigation will result in substantial judicial economy and substantial benefits to the party defending against the class. Such a procedure allows the defendant the possibility of resolving the litigation on its merits in favor of the defendant prior to incurring the expense, delay and potential notoriety associated with notice to absent class members. *Civil Service Employees Insurance Company v. Superior Court,* 22 Cal.3d at 373. Petitioner did not avail itself of this opportunity in the trial court.

Respondents did move the trial court for an order that the case proceed as a class action. At this noticed hearing, Respondents put before the court evidence sufficient to establish a prima facie case of liability, including affidavits of purchasers of Petitioner's automobiles and affidavits of experienced automobile mechanics familiar with the problems caused by valve stem seals in Petitioner's 1975-1979 automobiles. Most importantly, Respondents presented to the trial court documents containing admissions of Petitioner to its own authorized dealers that the original valve stem seals had caused substantial owner complaints regarding excessive oil consumption, and that these complaints could be satisfied by replacement of the original valve stem seals with seals of new design. (See Appendix C, pp. 17-21 of Appendix 12 to Defendant's Petition for Writ of Mandate and Memorandum in Support Thereof.)

At this hearing for class certification Petitioner had full opportunity to present any evidence it wished (either demonstrative evidence or testimony through affidavits) in order to persuade the trial court that the action should not be maintained as a class action or was without merit. The trial court ruled that some but not all of Respondent's claims could be maintained in class form.

Following the motion for class determination, Respondents brought a noticed motion on the issues of notice and apportionment of notice costs presently before this Court. Additionally, factual material was presented to the Court to support Respondents' argument that notice costs should be borne by Petitioner, including the existence of an ongoing FTC investigation into faulty valve stem seals in Petitioner's 1975-1979 automobiles. Petitioner appeared at

this second hearing and vigorously presented its opposition to a preliminary apportionment of notice cost.

Moreover, Petitioner has always had the opportunity to move the trial court for an order that Respondents post security or bond as a condition of Petitioner's advancing a portion of the cost of notice. No California statute or decisional law prevented Petitioner from affirmatively seeking such relief from the court below. Petitioner failed to do so. (See p. 14, ftn. 1.)

Despite this substantial record of due process hearings and Petitioner's failure to seek affirmative relief in the form of a bond as security, Petitioner asserts that it was denied procedural due process by the trial court's ordering preliminary apportionment of the cost of publication.

Having failed to seek the appropriate relief from the trial court, Petitioner cannot successfully plead a permanent taking of its property in this Court. Indeed, the best that the record demonstrates is that Petitioner has been ordered to advance a portion of the cost of notice, a recoverable cost of suit, after two noticed hearings at which Petitioner had full opportunity to present its case.

C. The Court's Order Apportioning The Initial Cost Of Notice—A Recoverable Cost Of Suit—Fully Satisfies Due Process Standards Set Forth By This Court For A Temporary Deprivation Of Property And Therefore Presents No Substantial Federal Question

Petitioner has cited a series of cases decided by this Court involving various prejudgement creditors' remedies (and one case involving administrative termination of social security disability benefits) as authority for its claim that the notice order violates its procedural due process rights. *Snaidach v. Family Finance Corporation,* 395 U.S.

337 (1969); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975); *Mathews v. Eldridge,* 424 U.S. 319 (1976).

In each case, this Court determined whether the "deprivation" satisfied procedural due process requirements where *no* hearing was afforded the debtors (or social security claimant) prior to the deprivation (or discontinuance of the benefit).

None of the cases cited by Petitioner challenged temporary deprivation of property following a full, noticed hearing where the person whose property rights were to be affected had full opportunity to be heard and present any evidence relevant to the issue presented. None of the cases cited went further than requiring some type of notice and hearing prior to the sequestration or other temporary deprivation of property.

> Our past cases mandate that some kind of hearing is required at some time before a state finally deprives a person of his property interest. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). However, as many of the above cases recognize, we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the state to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

Parratt v. Taylor, 451 U.S. 527, 540-541, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) (emphasis added).

Unless Respondents ultimately prevail in the trial court, Petitioner will be able to recover the amounts it has expended as its share of the cost of notice. No "permanent deprivation" of such funds will occur until there has been a full hearing on the merits. The procedure utilized to establish Petitioner's preliminary obligation to advance a portion of the notice cost provided more procedural protection than any decision of this Court has ever mandated as constitutionally necessitated. No substantial federal question is presented on this record.

In *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), this Court interpreted F.R.C.P. Rule 23 to require that costs of notice be advanced by the plaintiff, as part of the "ordinary burden of financing his own suit." In other situations, this Court has indicated that federal courts do have the power to shift costs incident to notice. *Oppenheimer Fund v. Sanders,* 437 U.S. 340, 57 L.Ed.2d 253, 98 S.Ct. 2380 (1978). Nowhere has this Court ever indicated that shifting the cost of notice to a defendant after a noticed hearing on the matter would violate a defendant's due process rights.

Both *Eisen IV* and *Oppenheimer v. Sanders* were decided under Federal Rule 23. *Oppenheimer v. Sanders* indicated that Rule 23, rather than the discovery rules, governed a federal court's discretion in apportioning costs of notice. Further, the holdings in *Eisen* and *Oppenheimer Fund v. Sanders* both suggest that the evaluation of whether to shift any of the costs incident to notice should rest on the federal policy that the notice does not benefit the defendant in a class action but is primarily for the benefit of the class representative.

The California trial court derives its authority to shift notice costs directly from legislative enactment. California

Civil Code Section 1781(d); *Civil Service Employees v. Superior Court,* 22 Cal.3d at 376. Moreover, under the California scheme it is the trial court and the defendant who primarily benefit from the sending of notice to class members. The court benefits by minimizing the burden of repeated suits over the same issue, and the defendant benefits by reducing or eliminating the possibility that it could obtain a judgment in its favor and not be able to apply that judgment to absent class members who have not received adequate notice. *Home Savings and Loan Association v. Superior Court,* 42 Cal.App.3d 1006, 1011-1012, 117 Cal.Rptr. 485, 488 (1975). Hence, California has permitted trial courts, in their discretion, to shift some or all of the cost of notice to the defendant, under the same principles that trial courts have shifted the initial cost of various other litigation expenses to either or both of the parties to the litigation. Commonly shifted litigation expenses in California include the compensation of court-appointed expert witnesses, the compensation of court-appointed translators, the compensation of court-appointed blood test experts, and reference expenses. *Civil Service Employees Insurance Company v. Superior Court,* 22 Cal.3d at 378-379.

The federal rules and California practice differ substantially in philosophy and procedure for class actions. Such differences in philosophy and practice represent not a constitutional infirmity but an inherent strength contemplated by the federal system. The Constitution does not mandate that state courts follow federal rules in their handling of class actions. *Hansberry v. Lee,* 311 U.S. at 42.

Petitioner's attack on the trial court's preliminary apportionment of notice costs does not raise any substantial federal question.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should dismiss Petitioner's appeal and/or deny Petitioner's Petition for Writ of Certiorari.

DATED: August 30, 1984

Respectfully submitted,
HILL, SCHWARTZ, STENSON & BOUTIN

By DAVID H. SCHWARTZ
Attorneys for Respondents

(Appendices follow)

Appendix A

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In the Superior Court of the State of California
In and for the City and County of San Francisco

NO. 780 024

Joan Nosse, et al.,
Plaintiffs,

vs.

Volkswagen of America, Inc., et al.,
Defendants.

[Filed July 1, 1983]

DECLARATION OF SAMUEL A. KRANTZ RE COST OF NOTICE TO CLASS BY PUBLICATION

I, Samuel A. Krantz, hereby declare:

1. I am an member of the State Bar of California and have been employed by counsel for the plaintiffs herein to work on this case.

2. During the week of June 20, 1983, in response to an inquiry to plaintiffs' attorneys by the Court by Minute Order dated May 31, 1983. I conducted factual research on the most effective publication of class notice statewide in this action.

3. In the course of said investigation and research, I contacted Bruce Parker of the California Newspaper Service Bureau in Los Angeles, an agency which regularly arranges such statewide publications. Mr. Parker had an assistant prepare a list of newspapers actually published in each county, their total weekday circulation, and cost per inch for publication of a legal notice.

4. I also consulted a media marketing guide published in September, 1982 by the Standard Rate and Data Service, which detailed newspaper circulation in each county of California. Based upon this data and that received from the California Newspaper Service Bureau, I compiled a list of the major statewide newspapers on the basis of substantial circulation in their regional areas and whose circulation cumulatively penetrated into *every county* in California. The total circulation of the papers selected by this process is approximately 3,393,000 statewide.

5. I then contacted each of these newspapers and inquired into the cost of a one-eighth page advertisement to be run in their main section either for (1) one day, (2) three consecutive days, or (3) one day a week for three consecutive weeks.

6. The following data was obtained from these newspapers and my independent research for a one-eighth page advertisement. According to my research, at least one of these newspapers circulates in every county in California.

NEWSPAPER	CIRCULATION	COST: 1 DAY	COST: 3 CONSECUTIVE DAYS, OR ONCE A WEEK/ 3 WEEKS
Los Angeles Times	1,081,050	$2,880.00	$ 8,640.00
San Francisco Chronicle/ Examiner	684,937	2,553.00	7,659.00
San Diego Union	345,000	1,017.38	3,052.14
Sacramento Bee	228,764	789.60	2,368.80
San Jose Mercury	226,829	749.49	2,248.47
Oakland Tribune	183,065	484.61	1,417.71
Fresno Bee	153,977	612.36	1,723.68
Bakersfield Californian	150,500	369.60	1,108.80
Riverside Press	110,000	366.40	1,099.20
Redding Record Searchlight	34,000	106.80	319.20
TOTALS	3,392,886	$9,929.24	$29,637.00

7. Attached hereto for further illumination of the Court is a list of the major newspapers published in each county in California, compiled by California Newspaper Service Bureau, setting forth the cost of publication for one day. Also attached is a selected list of legal newspapers in each county in California, most of which are considerably cheaper than the major newspapers, obtained for "Legal Periodicals," pp. 63-031.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on June 29, 1983 at San Francisco, California.

/s/ SAMUEL A. KRANTZ

Samuel A. Krantz

Appendix B

Excerpt From Defendant's Memorandum Of Points And Authorities In Response To Plaintiffs' Motion For An Order Regarding Notice To Class and Allocation Of Cost Of Notice

III. PLAINTIFFS MUST BEAR THE COST OF PROVIDING NOTICE TO THE CLASS.

A. There Is No Basis For Shifting The Costs Of Notice To VWoA.

In *Civil Service Employees Ins. Co. v. Superior Court,* supra, 22 Cal.3d at 279, a four justice majority of the California Supreme Court took the position that the initial cost of class notice may be shifted to a defendant in an appropriate case without violating the due process clause.* The court concluded that trial courts may exercise discretion in light of "the wide range of factors that other courts have identified as relevant to the cost allocation decision" in determining whether to shift notice costs (id. at 380). The majority in *Civil Service* explained these factors as follows:

> * * * [W]e believe that no rigid rule as to the allocation of expense of notice is advisable and the better course is to decide the issue in each case on the basis of the relevant factors, including the apparent merit or lack of merit in the claim, the defendants desire to take advantage of the broader res judicata effect of a client's action, the number of named plaintiffs and their financial responsibility, the value and percentage of their holdings as compared with those of the entire class, the ability of plaintiffs to make the initial outlay required, and, of course, the cost of notice" (id. at 380, n. 10 quoting *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132).

*As demonstrated, infra, *Civil Service* should be limited to its facts and is not directly applicable to the present case. Even under the criteria of *Civil Service,* however, it would be an abuse of discretion to shift notice costs in this case.

In addition to *Berland v. Mack,* supra, the court also cited two other decisions, *Cartt v. Superior Court,* supra, 50 Cal. App.3d 960, 974, n. 21* and *Lamb v. United Security Life Company* (S.D. Iowa 1972) 59 F.R.D. 25, as identifying the factors to be considered in the cost allocation decision (id., at 380). Two of these cases, *Berland,* and *Cartt* by quoting *Berland,* add plaintiffs' ability to reimburse the defendant as a relevant consideration. The other case (*Lamb v. United Security Life Co.,* supra, 59 F.R.D. at 39) clearly implies that the plaintiffs' ability to post a bond for reimbursement is a relevant consideration.**

---

*Cartt, however, did not actually consider shifting costs of notice. The court of appeals in Cartt merely quoted a portion of *Berland v. Mack* in a footnote after citing the case as an example of a Federal decision that may be of value in California cases (id. at 974, n. 21).

**Contrary to the implication of plaintiffs' argument, the court of appeals did not hold in *Cartt* that the likelihood of renewed litigation is the "main consideration" to be weighed in cost allocation decisions (Pls.Memo. at 15). That case did not involve the issue of whether or not the cost of notice should be shifted to the defendant and did not evaluate the factors to be considered in making a cost allocation decision (*Cartt v. Superior Court,* supra, 50 Cal.App.3d at 974). The case only involved the issue of what *type* of notice must be sent to the class (id. at 973). The court expressly refused to consider the propriety of cost shifting.

> "As far as shifting all or part of the cost burden of giving notice to the defendant is concerned, probably the less we say about this problem at this time, the better" (id., pp. 974-975).

Plaintiffs' heavy emphasis upon the possibility of renewed litigation as the "main consideration" in the cost allocation decision thus lacks any basis whatsoever. Furthermore, plaintiffs' assertion that "this court should not be concerned with [the prospect of] multiple litigation" (Pls.Memo., p. 14) because "it doesn't even approach a remote possibility" belies the facts (Pls.Memo., p. 15). Plaintiffs allege damages from a defect in a valve stem seal which

Berland is the best guide for the standards to be applied in reaching a cost allocation decision. That decision explains:

> "Just as it would be unwise to frustrate the use of the class action devise by imposition of a rigid rule that plaintiffs must pay the cost of notice, so it would be equally unfair to adopt a rule that cost must be paid out of the corporate coffers * * *. To give a single member of a class who asserts a claim of doubtful merit the power to trigger such a substantial expenditure of corporate funds, without any assurance of joinder on the part of other class members, smacks of confiscation. Should the corporate defendant in such a suit prevail on the merits after laying out the initial expense of notice to the class, it would in most cases find it impossible to obtain reimbursement [citation omitted]" (*Berland v. Mack,* supra, 48 F.R.D. at 131-132).

Berland makes clear that notice costs should be shifted only in the most compelling case where the relevant factors strongly weigh in favor of the plaintiffs.

> "* * * where the claim's merit is doubtful, the cost of notice is high, the defendants have no particular desire to gain the advantages of a class res judicata and plaintiffs would be unable in the event of dismissal to reimburse the corporation, plaintiffs should be required to pay out the initial expense rather than obtain a 'free ride' at the corporation's expense" (ibid.).*

> "* * * causes excessive oil consumption, occasional engine seizure, excess wear and tear on other engine parts and other related engine problems" (Pls.Memo., p. 2).

The claims asserted on behalf of some of the individually named plaintiffs run into several hundred dollars. For example, Joan Nosse is claiming $1,200 in damages. (First Amended Complaint, ¶ 6a.) In view of the substantial size of the potential claims, there is a very real prospect of multiple litigation here (see, infra, pp. 22-23).

*The district court's opinion in *Lamb v. United Security Life Co.*, supra, 59 F.R.D. at 39, expresses a similar view.

Applying the relevant factors, the *Berland* court ordered the plaintiffs to pay the cost of mailing a copy of the notice to each identifiable class member (id. at 133) even though it found that plaintiffs' claims were prima facie meritorious, that defendants desired to have the suit declared a class action to take advantage of class res judicata, that the total cost of notice was relatively modest, and that the plaintiffs were in a financial position to pay some of the notice expense required (id. at 132-133).

The plaintiffs in this case make no convincing showing on the relevant factors. They must, therefore, be required to pay the cost of notice.

The first factor involves the merits of plaintiffs' claims. Plaintiffs originally alleged nine causes of action; the Court certified a class as to only five. However, even as to the certified claims there is doubtful basis for any finding in favor of plaintiffs on the merits.*

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*It is unlikely that plaintiffs will be able to prevail on any of the certified claims. For example, plaintiffs must establish privity between the members of the class and VWoA to prevail upon their express warranty theory. As the attached affidavit of Gerhard Riechel demonstrates, all of the subject vehicles were sold free and clear to franchise dealers for resale to their customers (Affidavit of Gerhard Riechel, ¶ 4, attached hereto as Exhibit A). Thus VWoA has never been in contractual privity with the class members. In order to prevail under their warranty theories, plaintiffs must prove buyer reliance upon representations made by defendant. Plaintiffs have been unable to make any such showing. Similarly, plaintiffs' causes of action for misrepresentation and concealment must fail in view of the absence of proof of any misrepresentation and reliance. The lack of merit in plaintiffs' claims is also reflected in the predominance of individual issues for each of their claims. For example, the fact of injury is an individual issue which remains to be proved in every case. Causation is also an individual issue that must be established for each class member. Indeed most, if not all, of the issues necessary to establish plaintiffs' various theories of liability are individual. Unique and varying defenses are available to each.

Plaintiffs seek to sidestep this gap in their showing by piggybacking their claims on settled or as yet undetermined Federal agency proceedings. They claim that the FTC issued a complaint against VWoA based upon similar allegations

> " * * * wherein the Commission has determined after investigation, that the FTC has 'reason to believe' that VWoA has violated the Federal Trade Commission Act, 15 U.S.C. § 45" (Pls.Memo., p. 15).

In addition, the EPA is said to have found that a substantial number of VW vehicles burned excessive oil because of valve stem seal defects. These claims are belied by the very exhibits plaintiffs use to support them.

The complaint of staff counsel for the FTC is hearsay. It is not a determination of the merits of any allegation. It is not even evidence of what it alleges, and it is improperly cited as such in plaintiffs' memorandum. The filing of the complaint merely initiates an action to be adjudicated before an administrative law judge. In any event, the FTC complaint makes no direct allegation of any specific technical defect and, in fact, suggests potential sources of oil consumption other than valve stem seals (see FTC complaint, ¶ 6A Plaintifs' Exh. D). Even an FTC determination on the merits adverse to VWoA would not necessarily resolve any of the issues in this case.

Plaintiffs' suggestion that the denial of the VWoA's motion for partial summary judgment in the FTC proceeding demonstrates the merits of their claims is specious. Neither of the orders relied upon by plaintiffs is a determination by the administrative law judge on the merits (Pls.Memo. at 16 and Exh. D thereto). In the first order the administrative law judge ruled that VWoA's motion for partial judgment was premature because the FTC had not yet obtained discovery of the designer and manufacturer of the engine in question. Complaint counsel argued

that they could not yet present sufficient factual evidence to oppose VWoA's motion.* It was solely upon this ground that the administrative law judge declined to dismiss the post-1979 and diesel vehicles from the complaint (ibid.). The other order simply found the FTC has in personam jurisdiction over Volkswagenwerk Aktiengesellschaft (ibid.), an entity which plaintiffs voluntarily dismissed from this suit prior to class certification.

Plaintiffs suggest that a more important factor demonstrating the merits of their claims is that

> " * * * the Environmental Protection Agency (hereinafter, 'EPA') has, in October 1980 issued a Notice of Non-Conformity Finding and Order re: Remedial Plan indicating that a substantial number of VWoA vehicles, (makes and models involved in this class action lawsuit) was *because of excessive oil burning due to valve stem seal defects,* polluting in excess of federal standards" (Pls. Memo., p. 16) (emphasis added).

This representation of the EPA's action is wrong. The Notice and Order reads, in relevant part, as follows:

> "We believe that the NOx [oxgides of nitrogen] nonconformity in [the smaple of ten test] vehicles is caused by a defect in the Exhaust Gas Recirculation (EGR) system. Many vehicles were observed to have

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*Complaint counsel's opposition was analogous to that permitted under Rule 56(f) of the Federal Rules of Civil Procedure. Under that Rule, a party may defeat a motion for summary judgment through the presentation of affidavits demonstrating that he cannot present by affidavit facts essential to justify his opposition due to the need for further discovery on the issues raised in the motion. Indeed, in his order, the administrative law judge expressly found that complaint counsel "cannot precent by affidavits facts essential to justify their opposition to respondents' [summary judgment] motion," i.e., a colorable case against VWoA. (Order Denying Respondents Motion for Partial Summary Judgment, p. 2, Plaintiffs Exh. D.)

> deposits on the EGR valves which caused the valves to become inoperative and prevent exhaust gas recirculation.
>
> * * * At this time the cause of the [hydrocarbon] non conformity has not been determined" (Attachment 1 to plaintiff's Exh. E.)

The EPA's Notice and Order do not discuss or even mention valve stem seals and were not based upon a finding of excessive oil burning.*

As to the second *Civil Service* factor, this is most definitely not a case in which the defendant welcomes or only nominally opposes class certification in order to take advantage of the binding effect of final judgment (compare *Berland v. Mack,* supra, 48 F.R.D. at 133). Here, VWoA vigorously opposes class certification and is currently challenging the certification order in the court of appeals. These actions reflect VWoA's "rather weak interest in res judicata advantage" through its "strenuous resistance" to class certification *(Lamb v. United Security Life Co.,* supra, 59 F.R.D. at 41).

Plaintiffs' attempted showing as to their financial responsibility, or lack thereof, has been stricken from the record following their refusal to allow VWoA any discovery on the issue. Thus, the only information before the Court relevant to the four remaining *Civil Service* factors is the First Amended Complaint which names the six plaintiffs and the statement of plaintiffs' counsel that "[l]itigation costs are being met adequately" (Declaration of William Weiner In

---

*The issuance of such a Notice and Order, if contested, amounts to no more than a complaint initiating administrative proceedings. 40 C.F.R. § 851807.

Support of Plaintiffs' Motion For Class Certification, ¶ 9).* Based upon this record, each of the remaining factors must be determined against plaintiffs.**

---

*If there is an inclination to impose notice costs on defendant, plaintiff's financial capability to reimburse or secure such costs is not only an appropriate, but an essential subject of discovery and hearings (see, e.g., *Berland v. Mack*, supra, at 131-132).

**Although plaintiffs initiated this class action on behalf of an estimated 200,000 people, they are unwilling to pay for any portion of the cost of providing notice. The imposition of this cost upon VWoA will, for all practical purposes, constitute a permanent deprivation. The chance of a successful class action defendant recovering notice costs advanced to the class members after the entry of judgment is virtually nonexistent (see *Cartt v. Superior Court, supra,* 50 Cal.App.3d at 975, fn. 22). Consequently, plaintiffs should be required to post an appropriate bond in the event VWoA is ordered to pay all or part of the costs of notice to protect VWoA's interests.

A plaintiff obtaining an injunction is required to post a bond or other security for damages that the defendant may sustain as a result of the injunction. (Code Civ. Proc., § 529). The purpose of this requirement is to protect the defendant from loss in the event it is ultimately determined that the injunction was wrongfully issued. Where, as here, the plaintiffs seek an order requiring the defendant to advance large sums prior to a determination on the merits, a similar undertaking should be required to protect the defendant's interests.

Appendix C

Excerpt From Appendix 12 To Defendant's Petition For Writ Of Mandate And Memorandum In Support Thereof

VOLKSWAGEN
OF AMERICA, INC.
Englewood Cliffs
New Jersey 07632

ATTENTION: SERVICE MANAGER

SUBJECT: Service Program MQ

Dear Dealer Service Manager:

Enclosed is the complete MQ service program package which includes the following material:

— Service Program Circular
— Copy of Customer Notification
— Work Procedure
— Accounting Procedure
— Time Requirement Explanation
— Copy of Questionnaire/Refund Claim Form

A) *Service Program Circular*
Outlines all pertinent aspects of the service program.

B) *Customer Notification*
VWoA's mailing will be as follows:
— letters to customers of 49 State vehicles
— letters to customers of California equipped vehicles
— letters to customers of California equipped vehicles which have had already new valve stem seals installed and for which VWoA has paid.

EXHIBIT B TO FURTHER RESPONSE TO INTERROGATORY NO. 1—SECOND SET

C) *Work Procedure*
Outlines the sequence of steps to be taken to replace the valve stem seals without removing the cylinder head, utilizing the specially developed tool kit, part number US 4498, which has been supplied to you free of charge.

D) *Accounting Procedure*
Describes the various time allowances and applicable reimbursement codes.

E) *Time Requirement Explanation*
Detailed explanation of time requirement study.

F) *Questionnaire and Refund Form*
Customers who have had the new type valve stem seals installed already and have paid for this repair, are eligible for a refund of up to $125.00 from VWoA. However, in order to qualify, customers are being asked to submit to you or your staff a paid invoice or other evidence. We request that you verify the repair, complete the questionnaire and suggest to the owner that he should return the completed questionnaire to VWoA.

Thank you for your cooperation.

Sincerely,

VOLKSWAGEN OF AMERICA, INC.
/s/ F. X. KAMMERBAUER
F. X. Kammerbauer
Manager,
Technical Services

JvH/lss
enclosure

February 5, 1982

SUBJECT: Service Program MQ

Gentlemen:

VWoA will commence a service program involving 1977 through 1979 model CIS equipped Rabbit and Scirocco vehicles which is designed to reduce emissions as well as oil usage.

Customer Notification

First Class mail notification of owners will begin February 15, 1982. Copy of owner notification letter is enclosed. Vehicle allocation list containing names and address of owners residing in your area of responsibility will be sent to you prior to owner notification.

Work Procedure

49-State Vehicles:

(a) install vacuum control valve to delay advance of ignition system and plug two vacuum ports of EGR system.

(b) if oil consumption is of concern to the owner, replace OEM intake and exhaust valve stem seals. Seals which have already been replaced after July 1, 1979 should *not* be replaced again. Only Viton seals were available since July 1979.

California Vehicles:

Perform work procedure described in (b) only. Do not modify EGR and ignition system.

Detailed work instructions are enclosed.

Parts Requirements:

Necessary parts will be shipped to you automatically prior to February 15, 1982.

The individual parts required for this action are as follows:

8	Valve Stem Seals (Package of 8 plus 2 installation sleeves)	035 109 675
1	Sealing Strip	056 103 489A
1	Gasket	056 103 483C
1	NOx Kit	200 198 101

Time Allowance and Accounting Procedure:

New tool set No. US 4498 will automatically be shipped free of charge to you. Use of this tool set simplifies removal of valve assembly and valve stem seals, and saves time. Time allowance and accounting procedures are enclosed.

Identification of Service Program Completion:

Pre-printed completion identification labels will be supplied to you together with your vehicle allocation list. Please insert your dealer number with a typewriter or non-erasable pen and affix label to left front door jamb. Make sure that area is cleaned where label is to be affixed.

Sincerely,

VOLKSWAGEN OF AMERICA, INC.
/s/ F. X. KAMMERBAUER
F. X. Kammerbauer
Manager,
Technical Services

JvH/lss
enclosure

Office-Supreme Court, U.S.
FILED
SEP 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VOLKSWAGEN OF AMERICA, INC.

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (JOAN NOSSE, et al Individually and on Behalf of All Others Similarly Situated, Real Parties in Interest)

On Appeal From The Supreme Court of California

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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PRELIMINARY STATEMENT

This brief responds to appellees' "Motion to Dismiss Appeal (Or In The Alternative To Affirm The Judgment Of The California Court Of Appeal)" [hereinafter "Motion To Dismiss"].

Appellees' overriding contention is that the Questions Presented on this Appeal have not been properly raised below. (Motion To Dismiss, p. 2) This claim is not easily squared with their own statements before the Court of Appeal below:

> The Petition for Writ of Mandate filed herein contends that [appellant] has been deprived of due process by an order of Respondent Court ordering publication of a class action notice . . . and dividing the costs of such publication by a ratio of 3/4 to [appellant] and 1/4 to plaintiff class members.
>
> * * *
>
> . . . This Order followed substantial briefs[1] on all of the questions involved, and multiple hearings before the court on all of the various issues raised by the motion [regarding form, dissemination and cost of notice].

Opposition to Petition for Writ of Mandate (Jurisdictional Statement, pp. 29a-30a, 33a)

Appellees thus have virtually admitted that "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb* v. *Webb*, 451 U.S. 493, 496 (1981). As briefly demonstrated below, the record fully supports this view.

I. The Issue Of Proper Notice Under Due Process Standards Is Clearly Raised, Reviewable Now, And Properly Appellant's To Present To This Court.

On this appeal, appellant urges first that due process mandates individual notice to those class members whose names and addresses may be ascertained with reasonable effort.

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[1] Appellees' trial and appellate brief alone, insofar as they address the issues now before this Court, required 44 pages to reprint (Jurisdictional Statement, pp. 29a-47a; 58a-67a; 85a-99a).

(Jurisdictional Statement, p. i) Below, appellees consistently met this point on the merits, claiming that no notice at all is constitutionally required to any class members. (*E.g.*, Jurisdictional Statement, pp. 41a-46a) In this Court, however, appellees now assert that appellant has not shown that the names and addresses of any class members are in fact ascertainable. (Motion To Dismiss, pp. 4-5) As demonstrated below, the record is to the contrary.

At issue is appellant's computerized Vehicle Data File, discussed in the affidavit of John von Hollen, retail coordinator for appellant. (Jurisdictional Statement, pp. 81a-84a) Appellees note correctly that most of the names and addresses on file are not identifiable as those of class members. In so doing, however, appellees pointedly ignore Mr. von Hollen's sworn statement that ". . . class members who can be positively identified from [appellant's] Vehicle Data File are current California owners as to whom there has been no name or address change since May 7, 1979." Von Hollen Aff. (Jurisdictional Statement, p. 83a) Ascertaining the names and addresses of such persons requires only that the file be inspected and culled for qualifying entries. Whether accomplished manually or by computer, this task is far less burdensome than many found to meet the "reasonable effort" or "readily ascertainable" standard which appellant contends is constitutionally mandated here. *See, e.g., Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 166 n.5 (1974) [cross-tabulation of separate lists containing millions of names]; *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 359-360 (1978) [manual selection of records and punching of 300,000 cards for machine sort]. The record also shows that, regardless of their precise number, tens of thousands of such identifiable class members exist. Von Hollen Aff. ¶ 9 (Jurisdictional Statement, p. 83a) Appellant's first question presented is precisely supported by the record.

The lower court's order as to notice is clearly final for purposes of review in this Court. *Eisen* v. *Carlisle & Jacqueline*, *supra*, at 171-172. Accordingly, consideration of this issue at this time is in no way "premature". Appellees' innovative suggestion that the due process violation challenged here should first be perpetrated on an experimental basis (Motion to

Dismiss, pp. 6-7) should be rejected. This is particularly the case where the due process right in question is precisely the right to notification and opportunity to be heard and to present objections *in advance* of a binding order or judgment.[2] *Mullane* v. *Central Hanover Bank*, 339 U.S. 306, 314 (1950).

Lastly, appellant has full standing to raise the notice issue here. As in *Eisen* v. *Carlisle Jacquelin*, *supra*, appellant argues in favor of constitutional standards which its adversaries admit they may be unable to meet. (Jurisdictional Statement, pp. 63a, 99a) Regardless of whose judicial "rights" are technically at issue, appellant, the named defendant below, has a "personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204 (1964). Appellees themselves have in fact quantified this stake at up to $26,000,000. (Jurisdictional Statement, p. 6a) Decisions in this Court exemplify and endorse a class action defendant's rights in such cases. In *Eisen* v. *Carlisle & Jacquelin*, *supra*, representative plaintiff and class action defendant were aligned precisely as are appellant and appellees here. The notice issue was briefed by the parties and addressed by this Court without a word from the parties or the Court on standing. More recently, in *Oppenheimer Fund Inc.* v. *Sanders*, *supra*, this Court has explicitly cautioned against discouraging a defendant "from advancing arguments entirely appropriate to the protection of his rights *or the rights of absent class members*." *Id.* at 360 (emphasis added)[3]

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[2] Indeed, the very notice to be given in this case specifically states that any class member who does not timely request exclusion in writing "will be bound by any judgment in this case, whether favorable or unfavorable." Class Notice ¶ 7 (Jurisdictional Statement, p. 9a). Appellees' representations that ". . . the California trial court's notice order does not purport to establish *in personam* jurisdiction over all persons in the named class" and "does not purport to bind absent class members for whom more direct notice may be provided" (Motion To Dismiss, p. 11) are inexplicable.

[3] *Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.6 (1978), cited for the contrary view, is wholly inapplicable. In that action, this Court declined to consider a belated due process challenge to post judgment notice to members of the losing nominal defendant class of public officials in an injunctive action, where 1) the ruling sought in this Court could not affect the rights or

II. The Permanent Character Of The Deprivation At Issue Was Established And Preserved Before The Trial Court And Acknowledged By The Trial Judge. If Any Presumption Is Appropriate Here, It must Be Against Appellees.

Appellees contend that the cost-shifting at issue is "no more than a temporary deprivation." (Motion to Dismiss, p. 14)[4] This view is not shared by the court which ordered it. In open court and without objection or comment from appellees' counsel, the trial judge put the matter as follows:

> I am really troubled by what I am doing here and creating a situation where no matter what happens in litigation Volkswagen gets strapped with $60,000 or whatever it is going to be to send [notice] out. (8a)

In California, such an inference by a lower court is binding on appeal. Cal. Evid. Code § 600(b) (West); *In re Eric J.*, 25 Cal. 3rd. 522, 527 (1979). In addition, both the leading authority and the record below clearly support the lower court's understanding of its own actions.

In the leading decision on the very questions presented here, all members of the California Supreme Court specifically noted that many class action plaintiffs may not be able to afford notice costs. *Civil Service Employees Inc. Co.* v. *Superior Court*, 22 Cal. 3rd 362, 377, 382-383 (dissent) (1978). Accordingly, in the absence of evidence, appellees must be presumed unable to defray or reimburse the notice costs at issue.

Such presumption is especially appropriate where appellees have declared under oath their inability to pay such costs[5] and

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interests of the moving party, 2) the proferred issue had never been raised at any stage of the proceedings below, and 3) the issue was for practical purposes "academic." *Ibid.*

[4] Appellees do not dispute that "the record contains no showing whatsoever that appellees can defray or reimbruse appellant for the cost of notice." (Jurisdictional Statement, p. 5) Instead, they argue that they should be presumed able to pay these costs, thus transforming their imposition on appellant into a "temporary" or "initial" deprivation subject to lesser constitutional standards. (Motion to Dismiss, pp. 13-21, *passim*)

[5] Before the intermediate appellate court, appellees quoted their own relevant sworn declarations as follows:

then successfully resisted further inquiry into the matter (Jurisdictional Statement, pp. 32a-33a) Regardless of what may or may not be in the record now, appellees' role in withholding evidence of their financial capabilities should estop them here from speculations about post-judgment remedies or at the very least subject them to adverse inferences on the matter. Cal. Evid. Code § 413 (West); *People* v. *Vaughn*, 262 Cal. App. 2d 42, 45 (1968).

Moreover, the trial court's ruling that appellees' finances were irrelevant to the cost allocation issue (Jurisdictional Statement, p. 32a) necessarily refused appellant's request to avoid permanent deprivation by having appellees post a bond. Indeed, at oral argument the trial judge specifically referred to and rejected the very passage in appellant's papers which raised this matter. (2a-3a, and footnotes; 7a).[6] In these circumstances, appellant was under no obligation to make a superfluous motion for security repeating the very points already decided against it.[7] In light of the above, it can come as no surprise that the trial court itself understood that any notice

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> *Because of my limited financial resources* and the relatively small amount of damages which I personally am claiming in this action, *I am financially unable* to carry the burden of paying for notice to the class in this action. (Jurisdictional Statement, p.31a, (emphasis added)

In this Court, by contrast, appellees have described these declarations without citation or even reference to the language emphasized above. (Motion to Dismiss, p. 14).

[6] Once more, appellees' presentation of the record before the trial court (Motion to Dismiss, p.14, n.1) is incomplete. The relevant passage from appellant's moving papers and the full transcript of the relevant hearing are attached as Appendices A and B.

[7] The most appellees suggest is that appellant's reluctance to encumber the record with such a separate motion was a "tactical error." This Court's jurisdiction should not turn on such technicalities. See *Barr* v. *Columbia*, 378 U.S. 146, 149 (1964) and cases cited. In any event, any doubt as to the meaning of the lower court's actions may be resolved by simply continuing the cause to permit amplification of the record. *See, e.g., Hammerstein* v. *Superior Court of California*, 340 U.S. 622 (1951). *See also Oppenheimer Fund Inc.* v. *Sanders, supra* at 346 n.7 in which, as here, the issue of security for the costs at issue was apparently brought to the lower court's attention without a formal motion.

costs imposed upon appellant would be unrecoverable. (*See* p. 4, *supra*)

In short, despite appellees' ingenuity, the record cannot now be rewritten. The issues presented on this appeal have been raised, preserved, argued, recognized and ruled on from the trial court level on. This Court's jurisdiction is properly invoked.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of this appeal. In the alternative, review should be granted under 28 U.S.C. § 2301.

Respectfully submitted,

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APPENDIX

APPENDIX A

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IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
in and for the City and County of San Francisco

No. 780024

JOAN NOSSE, JERRY KANE, *et al.*
Individually and on behalf of all persons
similarly situated,
Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VWoA'S MOTION FOR AN ORDER REGARDING NAMED PLAINTIFFS' FINANCIAL CAPABILITIES

Hearing Date: April 6, 1983
Dept.: Law and Motion
[To be heard by Court; do not refer to Commissioner.]

III. ARGUMENT.

A. Named Plaintiffs' Financial Responsibility And Their Ability To Pay For Notice Are Factors Which Must Be Considered Under The Authority Relied Upon By Plaintiffs.

Plaintiffs place central reliance on *Civil Service Employees Inc. Co.* v. *Superior Court* (1978) 22 Cal.3d 362, for their argument that this Court should shift all notice costs to defendant in this action (Noble Decl., ¶ 10). As plaintiffs themselves state in their memorandum in support of their motion for notice to the class (p. 15), that case "indicates that the trial court, at the notice hearing, is to consider [certain] factors * * * in determining who should bear the initial cost of notification." The factors identified in *Civil Service* include "the number of named plaintiffs and their financial responsibility" and "the ability of plaintiffs to make the initial outlay" (*Civil Service Employees Ins. Co.* v. *Superior Court*, supra, 22 Cal. 3d 362, 380 and fn.10).

See, also, *Cartt* v. *Superior Court* (1975) 50 Cal.App.3d 960, 974, fn.21; *Berland* v. *Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131-132; and *Lamb* v. *United Security Life Company* (S.D.Iowa 1972) 59 F.R.D. 25, 38-43, identified by the *Civil Service* court as setting forth relevant factors to be considered. Each includes "[the class representatives'] financial responsibility" and "plaintiffs' ability to make the initial outlay" in their relatively short lists of relevant factors.* Two of those cases (*Cartt* and *Berland*, at pages cited above) also list plaintiffs' ability to reimburse defendant as a relevant consideration. The other case (*Lamb*, at p. 39) suggests, by inference, that plaintiffs' ability to post a bond for reimbursement is a relevant consideration.*

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*The other factors listed in those opinions are "apparent merit or lack of merit in the claim," "the defendant's desire * * * [for] *res judicata*," "the value of [named plaintiffs'] * * * holdings," and "cost of notice."

*In this connection, see, also Comment, "Cost Allocation in California Class Actions: (1976) 13 Cal.Western Law Rev. 65, which discusses (at pp.

Evidence considered in this connection has included the number of shares of stock held by named plaintiffs, and the fact that named plaintiffs gave no indiction that they were unable to bear the cost of notice (*Lamb* v. *United Security Life Company*, supra, 59 F.R.D. 25, 41). Another court considered the amount of money in a named plaintiff's savings account as evidence that plaintiff was not unable to advance the cost of notice (*Roth* v. *Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 625-626, 631). See also, *Cartt* v. *Superior Court*, supra, 50 Cal.App.3d 960, 965, where the court considered the named plaintiff's annual salary as indicative of her lack of ability to pay the cost of mailing. This is the nature of evidence sought by VWoA (see Noble Decl., Exh. A, pp. 3-13).

In addition, plaintiffs' ability to bear notice costs, and the extent of such ability, may be relevant to the determination of *type* of notice which should be ordered. See *Cartt* v. *Superior Court*, supra, 110 Cal.App.3d 960, 962, 965, 973.

The only evidence submitted by plaintiffs on these issues are declarations from each of the named plaintiffs stating, in identical and conclusory terms:

> "Because of my limited financial resources and the relatively small amount of damages which I personally am claiming in this action, I am financially unable to carry the burden of paying for notice to the class in this action" (Noble Decl., ¶ 10).

This is woefully inadequate. VWoA clearly must have the right to explore the foundation for this conclusion, as well as to develop other relevant evidence. This Court must have that information if it is responsibily and adequately to exercise its discretion under the authority relied upon by plaintiffs. Any order issued by this Court without consideration of such information would be subject to challenge under the very authority upon which plaintiffs rely.

80-81) bonding of notice costs as a potential means to avoid due process challenges to shifting notice costs and which discusses plaintiffs' ability to post a bond as a relevant consideration.

Plaintiffs should be ordered to appear at the offices of VWoA's attorneys within several days of the hearing on this matter and answer VWoA's questions on these subjects. (footnote omitted)

APPENDIX B

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
in and for the City and County of San Francisco
Before the Honorable Stuart R. Pollak
Department 3

No. 780 024

JOAN NOSSE, JERRY KANE, *et al.*
Individually and on behalf of all persons
similarly situated,
Plaintiffs,

v.

VOLKSWAGEN OF AMERICA, INC., *et al.*,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, APRIL 6, 1983

THE CLERK: Nosse versus Volkswagen of America.

MR. WEINER [Attorney for appellee]: Good morning, your Honor.

William Weiner appearing for the plaintiffs.

MR. GRAHAM [Attorney for appellee]: Gilbert Graham also appearing for the plaintiffs.

MR. CHAVEZ [Attorney for appellant]: Mark Chavez for the defendant, Volkswagen of America.

Your Honor, this is before the Court as a result of the refusal of the plaintiffs to submit to depositions concerning their financial responsibility.

The plaintiffs have taken the position in this case that any inquiry into their financial status or ability to bare the cost of notice is irrelevant.

In fact, the Supreme Court in the Civil Service case clearly indicated that—

THE COURT: I read that.

What do you think about my tentative.

MR. CHAVEZ: Your Honor, I think that we need a little further relief.

THE COURT: Why is that?

MR. CHAVEZ: Because the issue of their financial responsibility is relevant. It is going to have to be decided at some point by this Court when it decides how to allocate the cost of notice. And unless we are permitted to take discovery on this issue, or in the alternative an order is entered establishing that the— For the purpose of allocating the cost of the notice that the plaintiffs are financially responsible and are capable of bearing the cost of notice. Then there is not going to be a factual record before the Court when it decides how to allocate costs.

THE COURT: There's something very troublesome about what you are trying to do here.

I mean, I am sympathetic with you to the extent that I don't think the plaintiffs can urge the lack of resources of these people and then hide behind—and not submit them to discovery and to the basis upon which they are saying it. On the face of it, we are dealing with consumers here, and whatever the particular financial condition may be of these individual plaintiffs, it strikes me that that will have little, if anything, to do with the proper manner of determining the way in which notice ought to be given, and who should pay for it. And certainly there are very strong countervailing considerations why these people shouldn't be subject to this kind of inquiry by reason of having filed the suit, it seems to me.

MR. CHAVEZ: Your Honor, it is our position that having assumed the—invoked the jurisdiction of this Court through class-action procedures, that the plaintiffs have assumed a certain burden and a certain obligation to the members of the class.

That moreover, your Honor, the issue of their financial responsibility is a factor to be considered in allocating the cost of notice.

Under the Civil Service case and cases which the Supreme Court has cited favorably in that decision, particularly Berland —

THE COURT: I saw that footnote. I read that case, and it is hard for me to believe that—that I am not quite sure what I am going to do with the costs and the notice. We will get to that when we get there.

If one of these plaintiffs happens to be a reasonably well to do person, imposing upon him what I guess you are estimating is 50, $60,000 of cost to give notice to the class, it would still be highly burdensome, to say the least, even if he had the ability to pay.

It seems to me much more important than the analysis of this individual's financial resources is an analysis of the amount of the claim in relationship to the costs involved and the number of parties to whom notice is going to be given, and so forth. And it just seems to me the answers to these questions about this person's financial resources are of really marginal relevance to a proper determination of what to do about notice.

MR. CHAVEZ: Well, your Honor, every court that has considered the issue of allocating notice has recognized that there's a due process concern with respect to imposing that cost on the defendant.

THE COURT: I am very sympathetic with it. When we get around to that hearing, I think that's a real problem.

I am really troubled about what I am doing here and creating a situation where no matter what happens in litigation, Volkswagen gets strapped with $60,000 or whatever it is going to be to send costs out. That's not a very happy result, and I am not quite sure what to do about it, but I can't really imagine that my answer to that question is going to be affected one wit by knowing how much money any of these plaintiffs happen to have in their bank accounts.

MR. CHAVEZ: But the rule the plaintiffs are advocating, your Honor, is that you can never conduct any inquiry whatsoever into their financial status based upon a bald assertion in one page declaration that they are financially incapable of bearing the cost of notice.

THE COURT: But they are going to have to withdraw that allegation. If they are going to rely upon the fact that these people can't afford to do it, then you're right. Then you are entitled to conduct discovery. On the other hand, if they are going to rely on the fact that that doesn't matter and these are individuals and this is a consumer class action and their financial position is irrelevant, then it is a different situation. If that is their position, then I don't think that these individuals ought to be subject to this kind of interrogation.

MR. CHAVEZ: Your Honor, it clearly is relevant, and you're going to have to address the issue of financial responsibility at some point when you determine how the costs should be allocated. And I believe that to make a reasonable decision on that issue, some discovery has to be taken to allow us to respond to their arguments that we should bear the entire cost of that notice.

MR. WEINER: Your Honor, I am rising only in the hopes of short cutting this argument, because you keep saying "if their position is," and we could indicate our position if the Court wishes; otherwise, I will let counsel continue.

THE COURT: Why don't you do that.

MR. WEINER: We understand your ruling. The way I understand it in following the Court's order, we do believe that the way you have expressed it is that if we don't do this. In light of that, what we're going to do is follow what the Court has suggested, or will order, and that is—just to make sure I understand—there are six pages of declarations, each one of one page from each of our plaintiffs.

THE COURT: I understand that also. Also, incidentally, just so you have a record, I don't believe the originals are in the file. I mean, I assumed that you intended to file them because you refer to them in a memorandum, but actually, I don't think they are in the file.

MR. WEINER: We will check that, your Honor.

At any rate, the six pages that are supposed to be in the file as originals—we have copies. I suspect counsel has copies?

MR. CHAVEZ: Yes, we have copies.

MR. WEINER: We will delete them literally from the motion by filing an addendum indicating that they should be deleted, if that suffices; and also in that addendum we will delete what I presume the Court means by reference to it, which I have read this twice this morning to make sure, and my understanding is that literally one sentence on page 14 of our memo regarding costs, which says the following: The named plaintiffs in this suit have indicated that they are financially unable to incur the cost of notice, footnote 12 and footnote 12 indicates the six declarations that I have just indicated. Otherwise, our basic argument is really, as the Court suggested, quite well for us, and that is it is irrelevant and, as we have said time and again in response to their motion to compel further responses.

THE COURT: I am not aware of any other references that would come within the scope of —

MR. WEINER: And in good faith, I have looked through it twice this morning and I find no others, because our main

thrust is, as the Court has indicated in a consumer cross-action case, it is irrelevant.

MR. CHAVEZ: Your Honor, I would like the opportunity to make a further review of their memorandum to see which portions do in fact make reference to their financial status, if I may?

THE COURT: Sure. You can do that. Call them if you find anything out.

It seems to me that it is the type of material that was just referred to that I am talking about. Anything that talks—refers specifically to these individuals' ability—and I distinguish that from any arguments that may be in there as to what burdens ought to be imposed upon consumers generally. Presumably, an individual consumer is less financially capable of bearing some financial burdens than companies the size of the defendant we're dealing with. We know that without looking at their banking account.

MR. CHAVEZ: May I address the relevance issue for a moment, your Honor?

THE COURT: Sure.

MR. CHAVEZ: I believe that under Burland and the other cases that the Supreme Court has cited, it is fairly clearly indicated that there are a number of factors the Court should consider in making an allocation of costs. And one of those—two of those factors directly relate to financial status, and they are the financial responsibility of the plaintiffs and their ability to bear the initial costs of notice.

If that is in fact correct, your Honor, then it is relevant what the financial worth of the plaintiffs is; and we have no way of knowing whether or not—and I am not saying they are—but we have no way of knowing whether or not these plaintiffs are independently wealthy.

THE COURT: I know. My feeling is this: That whatever relevance there may be, it is very, very marginal; and even if

an individual has $10,000,000, you know, he is a multi-millionaire, has lots of money, lots of assets, in determining how much costs he ought to be required to bear to give notice with respect to a claim where his maximum recovery is, let's say $200 or $300, the size of his bank account, is of very, very little relevance.

There are other factors that are relevant and have to be grappled with and which are not easy to resolve. But that particular aspect is of marginal relevance; and as against that marginal relevance is the substantial countervailing interests in what this would necessarily do to any consumer class action if this is the kind of interrogation that one has to subject themselves to.

There are all kinds of contexts in which courts are reluctant to open up one's financial affairs as the necessary price of bringing a lawsuit, except to the extent that it is really necessary to do it. And there are situations where it is necessary.

Here it is so marginal, and the burdens are so obvious, it seems to be substantial, but I just don't think there is any justification for it.

MR. CHAVEZ: Your Honor, if that independently wealthy person is able to—through invoking the rubric of a class action procedure—avoid bearing the cost of financing his own lawsuit and shift the burden of giving notice to the class, to the defendant, based solely upon a claim that this —

THE COURT: But he may not be able to do that. I may require these plaintiffs to bear some portion of the costs.

MR. CHAVEZ: Then how can the Court reasonably determine, or make a reasoned determination as to what portion they should bear?

THE COURT: By looking at factors other than how much he has sitting in his bank account.

I'm going to look at the amount of costs that are involved. I am going to look at the nature of the individual claims, and the

amount of people affected, you know, the strength of claims and other things. I just think that the size of his bank account is really virtually insignificant, and I am going to make certain assumptions, I suppose, as to the fact that plaintiff is in a position to—nobody is claiming the plaintiffs are impoverished, that they are indigent. They are consumers, and I think that says something. It says as much as we need to know in order to intelligently deal with how we should treat the costs.

MR. GRAHAM: Your Honor, may I inquire just as to the form. You want us to file revised declarations, or may we just prepare a court order that would indicate those particular situations?

THE COURT: I think a court order. You're not sending anything up to a jury here.

I think that is what I am going to do. I wrestled with this a little bit.

As I say, I don't know what I am going to do about costs. I think it is a real tough issue to be fair to everybody.

MR. CHAVEZ: I don't want to belabor the point, your Honor, but with respect to the consideration of the type of notice, it seems to me that we are in something of a logical bind here because in considering the type of notice that should be provided to the class, the Court of Appeal in Cart indicated that you should consider what the financial ability of the plaintiff is to bear that cost.

THE COURT: I guess another way to say what I said—I don't know if this means exactly the same thing or not—but it is this: I am going to make certain assumptions. If it comes out that I wind up entering an order imposing upon the plaintiffs more costs than they can possibly bear, then at that point they may choose to open up the issue and we will have to take a closer look at it. But I think at least in the first instance, if we can possibly approach the question without getting into this, we ought to do so.

MR. WEINER: Thank you, your Honor.